Supreme Court, U.S.
FILED

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No. 03-266 AUG 14 2003

In The Supreme Court of the United States

HICKS WILLIAM HELTON D/B/A/ B&H VIDEO,

Petitioner,

v.

JEFF HUNT, RUTHERFORD COUNTY DISTRICT ATTORNEY, AND DANIEL J. GOOD, SHERIFF OF RUTHERFORD COUNTY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

I. Whether N.C. Session Law 2000-151, which bans video gaming machines and establishes criminal penalties for its violation but exempts certain existing machines from such ban, violates the Ex Post Facto Clause of the United States Constitution, when the Petitioner, prior to the enactment of the statute, acquired and placed into lawful operation numerous video gaming machines, and the Petitioner is now subject to criminal penalties for such acts because it is impossible for him to comply with the statutory exemption.

II. Whether N.C. Session Law 2000-151, which bans video gaming machines and establishes criminal penalties for its violation but exempts certain existing machines from such ban, violates the Equal Protection Clause of the United States Constitution, when the creation of two classes of video gaming machine owners does not bear a rational relation to the purposes of the statute.

LIST OF ALL PARTIES

The caption of this Petition contains the names of all the parties to the proceeding in the United States Court of Appeals for the Fourth Circuit.

The Petitioner is an individual and not a corporate party. The Petitioner does not have a parent corporation, and there is no publicly held corporation that owns 10% or more of stock in the Petitioner.

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CITATIONS OF OPINIONS AND ORDERS ENTERED IN CASE

The opinion of the United States District Court for the Western District of North Carolina, Asheville Division, appears at *Helton v. Good*, 208 F. Supp. 2d 597 (W.D.N.C. 2002). The United States Court of Appeals for the Fourth Circuit affirmed in part and reversed in part at *Helton v. Good*, 330 F.3d 242 (4th Cir. 2003).

BASIS FOR JURISDICTION OF SUPREME COURT

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on May 27, 2003. There was no order respecting rehearing, and no request for an extension of time to file the Petition for Writ of Certiorari. Jurisdiction to review this case on a writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Ex Post Facto Clause of U.S. Const. art. I, § 10, cl. 1, the Equal Protection Clause of U.S. Const. amend. XIV, § 1, N.C. Gen. Stat. §§ 14-298, 14-306.1, and 14-309, and N.C. Session Law 2000-151, § 8. Pursuant to Sup. Ct. R. 14.1(f), the pertinent text of these sources is set out in the Appendix.

STATEMENT OF FACTS

A. Basis For Federal Jurisdiction In Court Of First Instance

This case was filed by the Petitioner in the Superior Court of Rutherford County, North Carolina. The Complaint was brought under the North Carolina Declaratory Judgment Act. The Petitioner sought a declaration that the North Carolina statutes at issue violate the Petitioner's rights under the United States Constitution. In addition, the Complaint contained a count seeking a preliminary injunction against the enforcement of such statutes. The Respondents removed this case to the United States District Court for the Western District of North Carolina on the basis of federal question jurisdiction. *See* 28 U.S.C. § 1441(b). Upon removal, the United States District Court possessed subject-matter jurisdiction pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, in light of the actual controversy presented by the imminent enforcement of the statutes at issue against the Petitioner, and the Petitioner's allegations that the enforcement of such statutes against him violates his rights under the United States Constitution.

B. Facts Material To Consideration Of Questions Presented

From January to early June 2000, the Petitioner purchased approximately 70 video gaming machines for use in his business, at a cost of $257,000. The Petitioner placed all such machines into lawful operation in North Carolina before June 30, 2000. These machines provide

approximately 80% to 85% of the gross income of the Petitioner's business.

On July 13, 2000, the North Carolina General Assembly passed Session Law 2000-151, which has been codified in part as N.C. Gen. Stat. § 14-306.1. This statute enacted a ban on video gaming machines in North Carolina. Although it bans such machines, § 14-306.1 contains a grandfather provision allowing continued operation of a machine if it was "a. Lawfully in operation, and available for play, within this State on or before June 30, 2000; and b. Listed in this State by January 31, 2000 for ad valorem taxation for the 2000-2001 tax year." N.C. Gen. Stat. § 14-306.1(a)(1).

N.C. Gen. Stat. § 14-298 was amended by Session Law 2000-151 to add video gaming machines prohibited by § 14-306.1 to the list of devices that a sheriff is authorized and directed to seize and destroy, if such a machine is being operated in the sheriff's jurisdiction. Session Law 2000-151 also amended N.C. Gen. Stat. § 14-309 to provide that any person violating § 14-306.1 is subject to criminal penalties ranging from a Class 1 misdemeanor to a Class H felony.

The Petitioner relied upon the law as it existed prior to the enactment of Session Law 2000-151 on July 13, 2000 in purchasing his video gaming machines between January and early June 2000. Although the Petitioner's machines were lawfully in operation by June 30, 2000, he could not have listed them for ad valorem taxation by January 31, 2000 because he had not acquired the machines within the listing period for the 2000-2001

ad valorem tax year, as specified by § 14-306.1(a)(1). Accordingly, pursuant to Session Law 2000-151, the Petitioner's machines were subject to immediate seizure and destruction by the Sheriff of Rutherford County.

In ruling that the foregoing statutes violate the Petitioner's equal protection and due process rights, the United States District Court for the Western District of North Carolina found that the Petitioner's machines were lawfully in operation and available for play within the state before June 30, 2000, but did not fall within the grandfather clause because they could not have been listed for ad valorem taxation by January 31, 2000. *Helton v. Good*, 208 F. Supp. 2d 597, 601 (W.D.N.C. 2002). The court accepted the Respondents' assertion that it was the likely purpose of the North Carolina General Assembly to prevent an influx of machines from South Carolina, which had banned them altogether beginning on July 1, 2000. *Id.* at 606.[1] The court also recognized that the state was pursuing a legitimate interest, the regulation of gambling, and that the North Carolina legislature permissibly could have chosen to ban the operation of video gaming machines altogether. *Id.* The issue thus became whether the method adopted by Session Law 2000-151 was rationally related to that interest. *Id.* The district court concluded that it was not.

According to the district court, given the fact that Session Law 2000-151 was not enacted until July 13, 2000,

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[1]1999 S.C. Laws Act 125, which enacted the South Carolina ban that became effective on July 1, 2000, was approved on July 2, 1999.

12 days after the South Carolina ban became effective, the relationship between the grandfather clause and the purported interest of North Carolina was difficult to discern. *Id.* Specifically, the district court held that the establishment of two dates—one by which any video gaming machine must have been in operation within North Carolina and an earlier date by which any such machine must have been listed for ad valorem taxation—was not rationally related to the objective of preventing an influx of South Carolina machines into North Carolina. *Id.* The court also noted that the establishment of the two dates could not have been in reaction to or in anticipation of a complete ban in South Carolina, when the North Carolina statute was enacted after the South Carolina ban went into effect, and two weeks after one of the dates specified in Session Law 2000-151 and several months after the other such date. *Id.* The district court found that the Petitioner and others similarly situated had purchased video gaming machines, brought them into North Carolina, and placed them into operation in reliance on the law as it existed during the first half of 2000. *Id.* The court concluded that the Respondents presented no rational explanation for the inclusion of a condition, i.e., listing a machine for ad valorem taxation, with which the Petitioner and others similarly situated could not possibly have complied. *Id.* at 607.

The district court also held that portions of the statute "come perilously close" to traducing the Ex Post Facto Clause of the United States Constitution. *Id.* The court noted that Session Law 2000-151 applied to events occurring before its enactment, and altered the definition

of criminal conduct with respect to those events. *Id.* The court found that the statute created the immediate possibility of a fine or imprisonment because of the failure to take an action that was not required at the time it could have been performed. *Id.* On the basis of these findings, the district court granted summary judgment to the Petitioner, declaring that §§ 14-298 and 14-306.1(a)(1)(a) and (b) are unconstitutional under the United States Constitution.

The Fourth Circuit Court of Appeals reversed with respect to the equal protection violation. *Helton v. Good*, 330 F.3d 242, 247 (4th Cir. 2003). The court determined that the grandfather clause was rationally related to the state's legitimate interest in regulating gambling. *Id.* at 245-46. Specifically, the court concluded that the establishment of two dates which a machine owner must satisfy in order to operate a machine under the grandfather clause was rationally related to the state's legitimate interest in restricting the number of new machines in the state. *Id.* at 246. Although finding that the Petitioner could not physically have complied with the tax-listing requirement, despite his full compliance with the prerequisite of lawful operation of the machines by the specified date, the court nevertheless determined that this fact did not undermine the rationality of the legislation. *Id.* at 246-47. The court noted the state's claim that machines entering North Carolina in early 2000 but not registered on the tax rolls were "highly likely to be migrating machines," and found that "those migrating machines, even if brought into North Carolina early enough to satisfy the January 31 requirement, were less likely to satisfy the June 30 lawful operation

requirement," which included a prohibition against certain cash payouts. *Id.* at 247. Stating that the validity of the statute is not dependent upon the existence of the South Carolina ban on video gaming machines, the court concluded, however, that "their interconnectedness leaves no doubt as to the rationality of the enactment." *Id.* According to the court,

> [t]he combination of two dates that a machine owner must meet, one for tax enrollment and the other for lawful operation and use, together work to limit the influx of new machines into North Carolina from south of its border, while protecting longtime video gaming devices.

Id.

The Petitioner respectfully submits that the court of appeals decided the question of the constitutionality of Session Law 2000-151 in a manner that conflicts with the relevant decision of the Supreme Court. The Petitioner will demonstrate herein that, as the district court concluded, the statute violates the Ex Post Facto Clause and the Equal Protection Clause of the United States Constitution.

ARGUMENT

I. SESSION LAW 2000-151 VIOLATES THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION.

N.C. Gen. Stat. § 14-306.1(a), enacted by Session

Law 2000-151, provides in relevant part:

> **§ 14-306.1. Types of machines and devices prohibited by law; penalties**
>
> (a) Ban on New Machines.—It shall be unlawful for any person to operate, allow to be operated, place into operation, or keep in that person's possession for the purpose of operation any video gaming machine as defined in subsection (c) of this section unless . . .
>
> (1) Such machine was:
>
> a. Lawfully in operation, and available for play, within this State on or before June 30, 2000; and
>
> b. Listed in this State by January 31, 2000 for ad-valorem taxation for the 2000-2001 tax year
>
> . . . .
>
> (e) Registration With Sheriff.—No later than October 1, 2000, the owner of any video game which is regulated by this section shall register the machine with the Sheriff of the county in which the machine is located using a standardized registration form supplied by the Sheriff. The registration form shall be signed under oath by the owner of the machine. A

material false statement in the registration form shall subject the owner to seizure of the machine under G.S. 14-298 in addition to any other punishment imposed by law.

Session Law 2000-151 also established criminal penalties for the violation of § 14-306.1. Section 14-309 provides:

§ 14-309. Violation made criminal

(a) Any person who violates any provision of G.S. 14-304 through 14-309 is guilty of a Class 1 misdemeanor for the first offense, and is guilty of a Class I felony for a second offense and a Class H felony for a third or subsequent offense.

(b) Notwithstanding the provisions of subsection (a) of this section, any person violating the provisions of G.S. 14-306.1 involving the operation of five or more machines prohibited by that section is guilty of a Class G felony.

In addition, Session Law 2000-151 amended N.C. Gen. Stat. § 14-298, which authorizes and directs the sheriffs of North Carolina to seize and destroy video gaming machines that do not meet the requirements of § 14-306.1:

§ 14-298. Gaming tables, illegal punchboards and slot machines to be destroyed by police officers

> All sheriffs and officers of police are hereby authorized and directed, on information made to them on oath that any gaming table prohibited to be used by G.S. 14-289 through G.S. 14-300, any illegal punchboard or illegal slot machine, or any video game machine prohibited to be used by G.S. 14-306 or G.S. 14-306.1, is in the possession or use of any person within the limits of their jurisdiction, to destroy the same by every means in their power; and they shall call to their aid all the good citizens of the county, if necessary, to effect its destruction.

The district court held that such provisions come "perilously close" to violating the Ex Post Facto Clause of the United States Constitution, noting that the changes made by Session Law 2000-151 include criminal penalties for the legal operation of video gaming machines before the statute was adopted. *See Helton v. Good*, 208 F. Supp. 2d 597, 607 (W.D.N.C. 2002). The district court was correct in its apprehension of Ex Post Facto Clause violations by Session Law 2000-151.

The Ex Post Facto Clause prohibits retroactive application of penal legislation. *E.g., Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994). This clause raises to the constitutional level one of the most basic presumptions of the law, that legislation, especially criminal legislation, is not to be applied retroactively. *Johnson v. United States*, 529 U.S. 694, 700 (2000). The Ex Post Facto Clause is violated if legislation gives retrospective criminality to

acts that were done before it was passed. *United States v. Stafoff*, 260 U.S. 477, 480 (1923) (statute purporting to construe Prohibition Act as leaving in force prior statutes repealed by such Act could not give retrospective criminality to acts occurring prior to passage of statute).

To prevail on an Ex Post Facto challenge, a party must show two things: (1) that the challenged statute operates retroactively, that is, that it applies to conduct completed before its enactment, and (2) that it raises the penalty from what the law provided when the party acted. *Johnson*, 529 U.S. at 699; *see Landgraf*, 511 U.S. at 270 (the Ex Post Facto Clause is triggered when a new provision attaches new legal consequences to events completed before the statute's enactment). In other words, a law violates the Ex Post Facto Clause if it (1) punishes as a crime an act previously committed, which was innocent when done, (2) makes more burdensome the punishment for a crime after its commission, or (3) deprives one charged with a crime of any defense available under the law in effect when the act was committed. *Collins v. Youngblood*, 497 U.S. 37, 37-38 (1990).

These constitutional principles are transgressed by Session Law 2000-151. This statute applies to events occurring before its enactment, the then-legal placing into operation or possession for operation of video gaming machines. *Helton*, 208 F. Supp. 2d at 607. The statute also establishes serious criminal penalties for any violation of the ban on video gaming machines that do not fall within the exemption of § 14-306.1(a). Session Law 2000-151 does not indicate that the criminalization of the placing

into operation or possession for operation of nongrandfathered machines is solely prospective or that prosecution cannot be pursued for such conduct occurring before the statute was enacted. Rather, § 8 of Session Law 2000-151, the effective-date provision, declares:

> **Section 8.** This act becomes effective October 1, 2000, except that:
>
> (1) G.S. 14-306.1(a), (c), (e), (i), (j), and (l) are effective when this act becomes law. Section 4 of this act, other than subsections (c) and (d), are effective when this act becomes law. G.S. 14-306.1(h) becomes effective 30 days after this bill becomes law.
>
> (2) Section 3 of this act and G.S. 14-306(c) and (d) as added by Section 4 of this act become effective with respect to offenses committed on or after October 1, 2000, except as to a violation of G.S. 14-306.1(a), they are effective when they become law.[2]

Thus, by the terms of the legislation, the newly-criminalized conduct, and the newly enacted penalties therefor, includes § 14-306.1's proscription against the placing of machines into operation and the possession of

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[2]Section 3 of Session Law 2000-151, to which § 8(2) refers, is § 14-309, the criminal-penalties section. Section 14-306.1(a) is the provision set out above which bans new machines subject to the grandfather exception.

machines for the purpose of operation, both of which were legal before the enactment of Session Law 2000-151. The Petitioner placed his machines into operation only once, in early 2000, relying on the law as it existed before the enactment of Session Law 2000-151. When the Petitioner did this, his act was legal. He is now subject to criminal punishment for that act[3] by virtue of a statute that was enacted after the conduct took place. Hence, Session Law 2000-151 has attached new legal consequences to events occurring before its enactment, and, as a result, the law runs afoul of the Ex Post Facto Clause. *Landgraf*, 511 U.S. at 270. Because the court of appeals rejected the district court's conclusion that Session Law 2000-151 violates the Ex Post Facto Clause, and found the statute constitutional in a manner that

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[3]The Petitioner is also now subject to criminal sanctions for another act that was legal before the enactment of Session Law 2000-151, the keeping of video gaming machines in his possession for the purpose of operation. The machines came into his possession for the purpose of operation only once, when he acquired them in early 2000. The statute now subjects him to punishment for that act, which was legal when it occurred. This conclusion is buttressed by the fact that § 14-306.1(h), enacted by Session Law 2000-151, provides criminal penalties for warehousing any video gaming machines, except in conjunction with the permitted assembly, manufacture, and transportation of such machines under § 14-306.1. The Petitioner stored the video gaming machines on his commercial premises, for purposes other than those presently permitted by Session Law 2000-151, when he acquired these machines before the enactment of the statute. He is currently subject to criminal penalties for that act, which was legal when it occurred.

conflicts with the relevant decisions of this Court as discussed above, it is respectfully submitted that the Court should grant the Petition for Writ of Certiorari.

II. SESSION LAW 2000-151 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

In order to satisfy the Equal Protection Clause of the United States Constitution, a classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the legislation, so that all persons similarly situated shall be treated alike. *Johnson v. Robinson*, 415 U.S. 361, 374-75 (1974). It is only when a governmental unit adopts a rule that has a special impact on less than all persons subject to its jurisdiction that the question of a violation of equal protection arises. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979).

In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes upon fundamental constitutional rights must be upheld against an equal protection challenge if there is a reasonably conceivable state of facts that could provide a rational basis for the classification. *Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Under the rational-basis test, while a state law does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect, the varying treatment of different groups or persons may not be so unrelated to the achievement of any combination of legitimate purposes that it can only be concluded that the government's

actions were irrational. *See Kimel v. Florida Board of Regents*, 528 U.S. 62, 84 (2000); *Vance v. Bradley*, 440 U.S. 93, 96 (1979); *cf. Vacco v. Quill*, 521 U.S. 793, 799 (1997) (if legislative classification or distinction neither burdens fundamental right nor targets suspect class, Supreme Court will uphold it against equal protection challenge so long as it bears a rational relation to some legitimate end).

The rational-basis test is not, however, without teeth, and arbitrary and irrational discrimination violates the Equal Protection Clause even under this deferential standard of review. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 83 (1988); *see Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (requirement of Oregon Forcible Entry and Wrongful Detainer Statute that a defendant who loses in the district court and who wishes to appeal must give, in addition to undertaking otherwise required, an undertaking with two sureties for payment of twice the rental of the premises violates Equal Protection Clause because it arbitrarily discriminates against tenants desiring to appeal from adverse decisions; such a requirement heavily burdens the statutory right of a defendant to appeal, and is not necessary to effectuate the state's purpose of preserving the property at issue). In deciding whether a statute passes muster under the Equal Protection Clause, the Court may consider the legislative facts upon which a classification is apparently based. Under rational -basis review, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental

decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational. *Fitzgerald v. Racing Association of Central Iowa*, 123 S. Ct. 2156, 2159 (2003); *Vance*, 440 U.S. at 111 (in equal protection case involving legislative classification, party challenging statute must convince court that legislative facts upon which classification is apparently based could not reasonably be conceived to be true by governmental decisionmaker).

North Carolina courts have found equal protection violations with respect to state gambling statutes containing exemptions. For example, in *State v. McCleary*, 65 N.C. App. 174, 308 S.E.2d 883 (1983), *aff'd*, 311 N.C. 397, 316 S.E.2d 870 (1984), the court was called upon to apply a North Carolina statute exempting certain organizations conducting bingo games and raffles from the general state proscription against lotteries. The defendant had been convicted of conducting a private lottery, in violation of the law prohibiting such. 308 S.E.2d at 887. The purpose of the exemption was to allow charitable organizations to conduct such activities in order to raise funds for their use, provided that the organization so doing had been in continuous existence in the county of operation of the raffle or bingo game for at least one year. *Id.* at 886. The legislature designed the statute to prevent the conduct of such games by professional operators, and sought to ensure that any charity sponsoring a game had roots in the community of at least six months' standing. *Id.* at 890. The court held that the exemption for charitable organizations had a rational basis and did not violate equal protection requirements. *Id.* However, the statute also contained an

exemption for homeowners' or property owners' associations. *Id.* at 886. This provision the court found violative of equal protection. According to the court, the exemption allowing homeowners' or property owners' associations to conduct raffles or bingo games failed even the rational-basis test, in that it bore no rational relation to the purposes of the gambling prohibitions or the charitable exemption, and had the effect of treating similarly situated persons and groups differently without a rational basis for doing so. *Id.* at 896. In so holding, the court stated that a privilege to conduct a bingo game or a raffle accorded to private homeowners' associations, whose sole purpose is to raise funds for landscaping common areas and facilities, had no relation to the legislative goal of the prohibition of gambling or to the charitable exemption. *Id.* Because such activities could not rationally be distinguished from the defendant's acts in conducting a lottery to sell a private home, and had the effect of treating similarly situated persons and groups differently, the exemption was unconstitutional as a violation of the defendant's equal protection rights. *Id.* The highest courts of other states have similarly found equal protection violations in gambling statutes which establish unreasonable classifications. *See, e.g., Ocala Breeders' Sales Co. v. Florida Gaming Centers, Inc.*, 793 So. 2d 899 (Fla. 2001) (statute governing intertrack wagering licenses violated potential licensees' right to equal protection of the law, given that statute was enacted to increase revenues at pari-mutuel wagering facilities by providing protection to thoroughbred horse breeders from state policy against off-track betting, but that no rational relationship existed between such purpose and detailed licensure criteria in statute).

In the case at bar, § 14-306.1(a) establishes two classes of owners of video gaming machines: those who acquired their machines before January 1, 2000 and, therefore, could list such machines for ad valorem taxation, and those, like the Petitioner, who acquired their machines and placed them into lawful operation before the ban but could not, by law, list them for the ad valorem tax year specified by the statute. The district court correctly held that this legislative classification is not rationally related to preventing an influx of machines from South Carolina in response to that State's ban. As the district court noted, South Carolina's ban took effect on July 1, 2000, and Session Law 2000-151 was not enacted until July 13, 2000. *Helton*, 208 F. Supp. 2d at 606. Therefore, Session Law 2000-151 came too late to provide actual prevention against an influx of machines from South Carolina before July 13, 2000, including the entire period when South Carolina machine owners were aware of the impending ban in that State[4] and were most likely to move their machines into North Carolina or to sell them to North Carolina operators. Operators of South Carolina machines were alerted seven months before the January 31, 2000 ad valorem taxation listing date set forth in § 14-306.1(a) that they might have good reason to move their machines into North Carolina. Session Law 2000-151—enacted one year after the South Carolina ban was approved, two weeks after the South Carolina ban went into effect, two weeks after the cutoff date established by Session Law 2000-151 for lawful operation, and five months after the ad valorem tax listing deadline established by Session Law 2000-151—is not rationally

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[4]The South Carolina ban was passed on July 2, 1999.

related to the state's proffered interest in discouraging an influx of video gaming machines from South Carolina.

More crucially, the inclusion of a second relevant date in the classification established by § 14-306.1(a)—lawful operation of a machine by June 30, 2000—extinguishes any possible rational basis for the legislative distinction between machine owners. If the requirement of listing for ad valorem taxation was designed to regulate gambling by targeting machines that were likely to be migrating, it was arbitrary and irrational to establish June 30, 2000 as a second relevant date, thereby creating an unnecessary, invidious classification that discriminated against those in the position of the Petitioner, whose machines were in lawful operation before June 30, 2000 but who were physically incapable of complying with the January 31, 2000 deadline for tax listing. The second relevant date accomplishes nothing but to favor existing operations over machines not yet in operation, which, without more, is not a legitimate legislative purpose. The regulation of gambling by preventing an influx of South Carolina machines could rationally have been accomplished only by establishing a single, nondiscriminatory date that was positioned close to the July 2, 1999 enactment of the South Carolina ban. Instead, Session Law 2000-151, as enacted, establishes two classes of machine owners with no rational basis for that distinction, and the district court correctly ruled that this statute violates the Equal Protection Clause of the United States Constitution.

Furthermore, in exempting certain machines from the ban, § 14-306.1(a) effectively creates a preference for

North Carolina residents. It is clearly more likely that machines operated by established North Carolina business owners will fall within the exemption of this statute than will machines operated by persons moving into the state from South Carolina or elsewhere. When a state engages in an unequal distribution of benefits, including exemptions from its laws, the distinctions it makes are subject to scrutiny under the Equal Protection Clause. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985). A state may not favor established residents over new residents based upon the view that a state may take care of its own, if such is defined by prior residence. *Id.* at 623. Newcomers, by establishing bona fide residence in a state, become a state's own, and may not be discriminated against solely on the basis of their arrival in the state after a specified date. *Id.* (New Mexico statute granting tax exemption for Vietnam veterans who resided in the state before a specified date, but denying exemption to such veterans who arrived in state thereafter, violated the Equal Protection Clause of the Fourteenth Amendment; statute bore no rational relationship to state's objective of encouraging Vietnam veterans to move to New Mexico, given that legislature set eligibility date long after triggering event occurred); *see also Zobel v. Williams*, 457 U.S. 55, 62 (1982) (neither creation of financial incentive for individuals to establish and maintain residence in Alaska, encouragement of prudent management of Alaska's permanent fund, nor apportionment of benefits in recognition of undefined contributions made by residents during their years of residency justified distinction made by state legislature between citizens who established residence in 1959 and those who later became residents; therefore, state

dividend-distribution plan based upon length of residence violated Equal Protection Clause); *cf. Fitzgerald,* 123 S. Ct. at 2159 (state statute taxing adjusted revenues from slot machines at different rates depending upon location of such machines within the state did not violate equal protection, when statute did not distinguish between in-state and out-of-state businesses, or favor state's long-time residents over residents who had more recently arrived from other states).

Promotion of domestic business within a state, by discriminating against foreign entities that wish to compete by doing business there, is not a legitimate state purpose under the Equal Protection Clause. *Metropolitan Life Insurance Co. v. Ward,* 470 U.S. 869, 880, *reh'g denied,* 471 U.S. 1120 (1985) (state statute imposing substantially lower gross premiums tax rate on domestic insurance companies than on out-of-state insurance companies violated equal protection). Moreover, a state statute denies equal protection if it imposes a condition on the ability to do business within the state with which an out-of-state entity cannot comply. *See Bethlehem Motors Corp. v. Flynt,* 256 U.S. 421, 426 (1921).

This Court, the United States Courts of Appeals, and the highest courts of various states have had occasion to consider the circumstances under which a statutory grandfather clause violates equal protection. In *City of New Orleans v. Dukes,* 427 U.S. 297, 304 (1976), the Court held that a regulation of the City of New Orleans, which prohibited the selling of foodstuffs in the French Quarter but exempted such vendors who had operated the same business within the French Quarter for eight

years prior to a specified date, rationally furthered the purpose of preserving the appearance and customs valued by residents and attractive to tourists, and did not violate equal protection. The Court noted that the 2 vendors falling within the grandfather provision had engaged in pushcart sales for more than 20 years each, and had themselves become part of the character and charm distinguishing the French Quarter. *Id.* at 304-05. In finding no equal protection violation, the Court stressed the nature of the affected parties' reliance interests. The Court concluded that the city could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operation in the subject area, and that the two vendors who qualified under the grandfather clause, given their longevity of over 20 years each, had become part of the charm of the locale. *Id.* at 305.

This Court's emphasis on the protection of reliance interests as a justification for statutory exemptions was further clarified in *Nordlinger v. Hahn*, 505 U.S. 1, 13-14 (1992), wherein it was stated:

> This Court previously has acknowledged that classifications serving to protect legitimate expectation and reliance interests do not deny equal protection of the laws. "The protection of reasonable reliance interests is not only a legitimate governmental objective: it provides an exceedingly persuasive justification. . . ." *Heckler v. Mathews*, 465 U.S. 728, 746, 104 S.Ct. 1387, 1399, 79

L.Ed.2d 646 (1984) (internal quotation marks omitted). For example, in *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 108 S.Ct. 2481, 101 L.Ed.2d 399 (1988), the Court determined that a prohibition on user fees for bus service in "reorganized" school districts, but not in "nonreorganized" school districts, does not violate the Equal Protection Clause, because "the legislature could conceivably have believed that such a policy would serve the legitimate purpose of fulfilling the reasonable expectations of those residing in districts with free busing arrangements imposed by reorganization plans." *Id.*, at 465, 108 S.Ct., at 2491. Similarly, in *United States Railroad Retirement Bd. v. Fritz*, the Court determined that a denial of dual "windfall" retirement benefits to some railroad workers, but not others, did not violate the Equal Protection Clause, because "Congress could properly conclude that persons who had actually acquired statutory entitlement to windfall benefits while still employed in the railroad industry had a greater equitable claim to those benefits than the members of appellee's class who were no longer in railroad employment when they became eligible for dual benefits." 449 U.S., at 178, 101 S.Ct., at 461. Finally, in *New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976), the Court

> determined that an ordinance banning certain street-vendor operations, but grandfathering existing vendors who had been in operation for more than eight years, did not violate the Equal Protection Clause because the "city could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operation." *Id.*, at 305, 96 S.Ct., at 2518.

(Footnotes omitted.) The *Nordlinger* Court went on to hold that exemptions to a property-tax reassessment statute for cases in which a person over 55 years of age sells a home and moves to one of the same or lesser value, and for transfers between parents and children of property valued at less than $1 million, were rationally related to the legislature's objective of not discouraging older persons from moving into a residence more suitable to their changing family size or income and preserving family and neighborhood continuity and stability. *Id.* at 17. Accordingly, such exemptions did not violate the Equal Protection Clause. *Id.*

Dukes and the other cases in which this Court has upheld a statutory exemption against an equal-protection challenge are readily distinguishable from the present case. The North Carolina statute here at issue established a very brief grandfather period, such that the protection of substantial reliance interests could not have been a factor underlying the legislation. An owner who placed a machine into operation only two weeks before the enactment of § 14-306.1(a) would benefit from the

exemption, provided that his or her machine was listed on the tax rolls five months previously, while a person in the position of the Petitioner, whose machines have been in operation substantially longer, is denied the benefits of the exemption. Moreover, unlike in *Dukes*, there is no "charm" factor at work, such that the North Carolina legislature could rationally have exempted certain machines based upon some intangible contribution to the established culture of the region. Rather, the grandfather provision in § 14-306.1 draws an arbitrary and irrational distinction possessing none of the redeeming purposes of those in *Dukes* and the other relevant cases, and is violative of the Equal Protection Clause.

The United States Courts of Appeals have also considered the equal-protection effect of grandfather clauses. As in the Supreme Court's decisions, the courts of appeals have recognized that the protection of reliance interests is the primary justification for a grandfather clause. *See Haves v. City of Miami*, 52 F.3d 918, 922 (11th Cir. 1995) (state may legitimately use grandfather provisions to protect property owners' reliance interests, citing *Dukes* and *Nordlinger*); *McCann v. City of Chicago*, 968 F.2d 635, 638 (7th Cir.), *cert. denied*, 506 U.S. 986 (1992) (grandfather clauses, which curtail the application of new rules to existing entitlements, protect expectation interests; such clauses are rational and do not violate equal protection, citing *Dukes* and *Nordlinger*); *Sklar v. Byrne*, 727 F.2d 633, 641 (7th Cir. 1984) (grandfather clause protecting reliance interests of residents of Chicago, who purchased and registered firearms prior to effective date of ordinance banning firearms, did not violate equal protection; however, if ordinance had provided that all

residents of Chicago on the effective date could own handguns and that all those who later moved to Chicago could not, the classification would be unlikely to survive an equal-protection challenge).

When reasonable reliance interests are lacking, grandfather clauses violate equal protection. One court of appeals held that a grandfather clause in an ordinance prohibiting the possession of certain weapons, which created an exemption for persons who had registered their firearms under a former ordinance that was ruled unconstitutionally vague, violated the equal protection rights of persons who had not registered their weapons under the prior ordinance. *See Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 531 (6th Cir. 1998). According to the court, there was no rational basis for extending a benefit only to owners who had speculated that their weapons fell within the purview of the former ordinance and registered them. *Id.* at 531; *see also Delaware River Basin Commission v. Bucks County Water & Sewer Authority*, 641 F.2d 1087, 1098-99 (3d Cir. 1981) (grandfather provision immunizing from water-use charges any withdrawals or conversions that could have been made without charge on effective date of Delaware River Basin Compact could not be justified by goal of distributing costs of projects among users whose demand for water arose after Compact; moreover, grandfather provision could not be justified by goal of preservation of rights to water that existed as of effective date of Compact since terms of Compact made it clear that Delaware River Basin Commission had authority to override whatever allocation systems had earlier been devised by signatory states).

The highest courts of various states have also addressed the constitutionality of grandfather clauses. In *Harrison v. Buckhalt*, 364 So. 2d 283, 284 (Ala. 1978), the court held that a city's exercise of its police power to prohibit the sale of beer was not without limitation, and that the manner of the enforcement of such an ordinance can constitute a denial of equal protection. The court went on to conclude that a grandfather clause in the ordinance, which banned the sale of alcoholic beverages within 600 feet of church or school grounds but permitted those already licensed and their successors to make such sales, resulted in an arbitrary classification that denied equal protection in violation of the Alabama Constitution. Similarly, in *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 313 N.W.2d 805, 811 (Wis. 1982), the court was faced with a classification scheme under which, in order to establish eligibility for a liquor license, an applicant had to receive at least 50% of its income from on-premises sale of alcoholic beverages. The grandfather clause in the ordinance provided that entities licensed when the ordinance was enacted were entitled to continue selling liquor as long as their licenses were renewed annually, regardless of whether such a licensee could meet the 50% on-premises requirement. *Id.* at 811. The court held that the grandfather clause violated equal protection because it was based upon the arbitrary date the ordinance became effective and not upon any substantial distinction between sellers, it contained a perpetual right (and not a temporary one) based solely upon existing circumstances, and the two separate classes established by the grandfather clause, whose sole distinguishing feature was whether they sold liquor before or after the

enactment of the ordinance, did not differ to a degree so as reasonably to suggest that substantially different treatment was appropriate. *Id.* at 812-13; *see also Lynden Transport, Inc. v. State*, 532 P.2d 700, 711 (Alaska 1975) (grandfather provision granting intrastate operating rights to certain resident carriers coextensive with carriers' interstate operating authority, without requiring a showing of public convenience and necessity, violates the Equal Protection Clause); *Mississippi Board of Nursing v. Belk*, 481 So. 2d 826, 832 (Miss. 1985) (grandfather clause establishing different licensing procedures for nurse anesthetists who had practiced before a specified date and for registered nurses who had practiced before the same date violated the Equal Protection Clause of the Fourteenth Amendment; state did not demonstrate reasonable basis for deferential treatment of such persons).

In the present case, the grandfather clause set forth in § 14-306.1(a) partakes of numerous constitutional infirmities. As discussed above, it does not protect any reliance interests of the type that have shielded such provisions against equal-protection challenges. *See Dukes*, 427 U.S. at 305. Although it can be argued, as the Respondents did below, that North Carolina could have banned video gaming machines entirely, a state's legitimate power to proscribe a practice deemed offensive must not take the form of an arbitrary exemption that denies equal protection to those disfavored by the exemption. *See Harrison*, 364 So. 2d at 285-86; *cf. Delaware River Basin Commission*, 641 F.2d at 1099. Section 14-306.1(a) simply establishes, without any rational basis therefor, a preference for one class of video

game owners over another according to arbitrarily chosen dates. Given the absence of any underlying reliance interests, § 14-306.1(a) establishes two classes without any substantial distinction between those classes. *See State ex rel. Grand Bazaar Liquors, Inc.*, 313 N.W.2d at 812-13. The district court correctly held that this statute violates the Petitioner's rights under the Equal Protection Clause. The court of appeals' validation of this statute, despite its constitutional transgressions, conflicts with this Court's decisions discussed herein. Accordingly, it is respectfully submitted that the Court should grant the Petition for Writ of Certiorari.

CONCLUSION

The district court correctly held that Session Law 2000-151 violates the Ex Post Facto Clause of the United States Constitution because it criminalizes acts by the Petitioner that were completed before the enactment of the statute and that were legal when done, and it attaches new legal penalties to such acts. In reversing and holding the statute constitutional despite its violation of the Ex Post Facto Clause, the court of appeals decided this case in a manner that conflicts with the relevant decisions of this Court.

The district court correctly held that Session Law 2000-151 violates the Equal Protection Clause of the United States Constitution because it establishes two classes of video gaming machine owners without a rational basis for doing so. The timing of the statute's enactment, and the establishment of two dates relevant to the operation of machines in North Carolina rather

than a single, nondiscriminatory date, preclude any rational basis for a legislative belief that the statute could have prevented an actual influx of machines into North Carolina in response to South Carolina's ban. Moreover, the grandfather exemption created by Session Law 2000-151 does not protect any reliance interest sufficient to sustain such exemption against its equal-protection infirmities, but merely establishes a preferred class of video gaming machine owners lacking a substantial distinction from disfavored owners. The court of appeals' decision that Session Law 2000-151 does not violate the Equal Protection Clause of the United States Constitution conflicts with the relevant decisions of this Court.

For all the foregoing reasons, the Petitioner, Hicks William Helton d/b/a B&H Video, respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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No._____

In The Supreme Court of the United States

HICKS WILLIAM HELTON D/B/A/ B&H VIDEO,

Petitioner,

v.

JEFF HUNT, RUTHERFORD COUNTY DISTRICT ATTORNEY, AND DANIEL J. GOOD, SHERIFF OF RUTHERFORD COUNTY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Appendix

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330 F.3d 242
(Cite as: 330 F.3d 242)

United States Court of Appeals,
Fourth Circuit.

Hicks William HELTON, d/b/a B&H Video, Plaintiff-Appellee,
v.
Jeff HUNT, Rutherford County District Attorney, Defendant-Appellant,
and
Daniel J. Good, Sheriff of Rutherford County, Defendant.
Hicks William Helton, d/b/a B & H Video, Plaintiff-Appellee,
v.
Daniel J. Good, Sheriff of Rutherford County, Defendant-Appellant,
and
Jeff Hunt, Rutherford County District Attorney, Defendant.

Nos. 02-1853, 02-1890.

Argued: April 2, 2003.
Decided: May 27, 2003.

Owner of video gaming machines brought state court action against county sheriff and district attorney, seeking declaratory judgment that statutes providing for destruction of machines and prosecution of their owners violated due process and equal protection. Defendants removed action to federal court. The United States District Court for the Western District of North Carolina, Lacy H. Thornburg, J., 208 F.Supp.2d 597, entered summary judgment in favor of owner. Defendants appealed. The Court of Appeals, Wilkinson, Circuit Judge, held that: (1) statute did not violate equal protection, and (2) statute

conferring power upon law enforcement officers to seize and destroy video gaming machines violated due process.

Affirmed in part, reversed in part,

Niemeyer, Circuit Judge, filed opinion, concurring in part, and dissenting in part.

West Headnotes

[1] Constitutional Law 211(2)

Unequal treatment under a law alone does not constitute an equal protection violation. U.S.C.A. Const.Amend. 14.

[2] Constitutional Law 70.1(5)

[2] Constitutional Law 211(2)

Defining the class of persons subject to a regulatory requirement inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration. U.S.C.A. Const.Amend. 14.

[3] Constitutional Law 213.1(2)

A state statute must be upheld as not violative of the equal protection clause so long as it bears a rational relation to some legitimate governmental end. U.S.C.A. Const.Amend. 14.

[4] Constitutional Law 213.1(2)

A state has a paramount interest in the health, welfare, safety,

and morals of its citizens, for purpose of determining whether particular statute is rationally related to legitimate governmental interest, for equal protection analysis. U.S.C.A. Const.Amend. 14.

[5] Constitutional Law 230.3(6)

The regulation of gambling lies at the heart of the state's police power, so that state has legitimate governmental interest in supervision of gambling industry, for equal protection purposes. U.S.C.A. Const.Amend. 14.

[6] Constitutional Law 250.1(2)

[6] Gaming 63(1)

Statute prohibiting operation and warehousing of certain video gaming machines not in operation in state by certain date, and not listed on tax rolls by date six months prior to enactment of statute was rationally related to state's legitimate interest in preventing influx of machines from bordering state that completely outlawed video gaming machines, and thus statute did not violate equal protection; state could have banned machines altogether, and even though owners of machines acquired before statute's enactment could not possibly have complied with law requiring tax roll listing, statute limited influx of new machines while protecting longtime machines. U.S.C.A. Const.Amend. 14; West's N.C.G.S.A. §§ 14-298, 14-306.1(a)(1).

[7] Constitutional Law 230.3(6)

A state has the power to prohibit gambling altogether without violating equal protection clause. U.S.C.A. Const.Amend. 14.

[8] Constitutional Law 211(2)

Statute may regulate by degree, addressing itself to phase of problem which seems most acute to legislative mind, without amounting to legislative classification violative of equal protection clause. U.S.C.A. Const.Amend. 14.

[9] Constitutional Law 251.6

The due process right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. U.S.C.A. Const.Amend. 14.

[10] Constitutional Law 278(1)

The due process clause operates to protect the use and possession of property from arbitrary encroachment, and to minimize substantively unfair or mistaken deprivations of property. U.S.C.A. Const.Amend. 14.

[11] Constitutional Law 319.1

Some contraband is intrinsically illegal in character, and courts will not entertain a due process claim contesting the confiscation of contraband per se because one cannot have a property right in that which is not subject to legal possession. U.S.C.A. Const.Amend. 14.

[12] Gaming 68(3)

Under North Carolina law, video gaming machines are not inherently illegal. West's N.C.G.S.A. §§ 14-298, 14-306.1(a)(1).

[13] Constitutional Law 277(1)

Unlike per se contraband, a property interest in derivative contraband is not extinguished automatically if the item is put to unlawful use, for purposes of due process analysis. U.S.C.A. Const.Amend. 14.

[14] Constitutional Law 303

Under the due process clause, derivative contraband may be subject to forfeiture, but only when authorized by a statute that provides appropriate procedural safeguards. U.S.C.A. Const.Amend. 14.

[15] Constitutional Law 48(8)

Although a court may strain to construe legislation so as to save it against constitutional attack, it will not do so to the point of judicially rewriting the legislation.

[16] Constitutional Law 319.5(1)

[16] Gaming 52

North Carolina statute conferring power upon law enforcement officers to seize and destroy video gaming machines upon information made to them on oath that machines were illegally possessed or used violated due process; North Carolina law did not make all video gaming machines illegal, but imposed restrictions upon operation or possession of machines, requiring, among other things, that machine be in operation in state on certain date and be listed on tax rolls by certain date, and statute did not require that officers check registration records or tax rolls before destroying machines, or provide any procedure or mechanism for determining whether machines

were illegal. U.S.C.A. Const.Amend. 14; West's N.C.G.S.A. §§ 14-298, 14-306.1(a)(1).

ARGUED: Scott Douglas MacLatchie, Womble, Carlyle, Sandridge & Rice, Charlotte, North Carolina; John Julian Aldridge, III, Special Deputy Attorney General, Raleigh, North Carolina, for Appellants. Luther Donald Starling, Jr., Daughtry, Woodard, Lawrence & Starling, Smithfield, North Carolina, for Appellee. **ON BRIEF:** Isaac T. Avery, III, Special Deputy Attorney General, Raleigh, North Carolina, for Appellants.

Before WILKINSON, NIEMEYER, and WILLIAMS, Circuit Judges.

Affirmed in part and reversed in part by published opinion. Judge WILKINSON wrote the opinion, in which Judge WILLIAMS joined. Judge NIEMEYER wrote an opinion concurring in parts I and II and dissenting from parts III and IV.

OPINION

WILKINSON, Circuit Judge:

In response to a South Carolina law banning video gaming machines from that state, North Carolina amended its gambling statutes to prevent an influx of machines from South Carolina. The revised statutes made the operation of certain machines illegal unless exempted by a grandfather clause under the statute. The statutes also authorized the immediate destruction of any unlawful machines.

Plaintiff Hicks Helton owned and operated machines which became unlawful under the statute. Helton filed a complaint challenging the constitutionality of the statutes. He

argued that N.C. Gen.Stat. § 14-306.1, which bans the operation of video gaming machines in North Carolina unless the owner can establish that the machines were in lawful operation before June 30, 2000 and registered for ad valorem taxation by January 31, 2000, violates equal protection. Helton further argued that § 14-298, which authorizes all sheriffs and officers to immediately destroy any allegedly illegal machine by every means within their power, violates due process. We reverse the district court's holding that § 14-306.1 violates equal protection, but uphold its decision that § 14-298 violates due process.

I.

On July 2, 1999, South Carolina enacted a law, effective July 1, 2000, banning all vending, slot, and video gaming machines. *See* S.C.Code Ann. § 12-21- 2710 (2000). Fearing that the ban would cause an influx of machines from South Carolina, the North Carolina General Assembly amended portions of the North Carolina criminal code to ban certain "slot machines and other devices." *See* N.C. Sess. Laws 2000-151. Section 14-306.1(a) makes it unlawful to "operate, allow to be operated, place into operation, or keep in ... possession for the purpose of operation any video gaming machine as defined [in the section]." N.C. Gen.Stat. § 14-306.1(a) (2001).

The statute does not ban all video gaming machines, however. Section 14-306.1(a)(1) contains a grandfather clause, exempting from the ban machines that were (1) "[l]awfully in operation, and available for play, within this State on or before June 30, 2000"; and (2) "[l]isted in this State by January 31, 2000 for ad valorem taxation for the 2000-2001 tax year." *Id.* § 14-306.1(a)(1).

The revised statute also makes it unlawful to "warehouse any video gaming machine except in conjunction with the permitted assembly, manufacture, and transportation of such machines," and requires the owner of any video game machine regulated by the statute to register the machine with the Sheriff in the county where the machine is located no later than October 1, 2000. *Id.* § 14-306.1(i), (m). Finally, § 14-298 authorizes and directs all sheriffs and police officers "to destroy [any video gaming machine prohibited by the statutes] by every means in their power" and also authorizes them to "call to their aid all the good citizens of the county, if necessary, to effect its destruction." *Id.* § 14-298.

Sometime in early 2000, plaintiff Hicks Helton purchased 70 new video gaming machines and put them into operation in Rutherford County, North Carolina. The machines were placed into operation before June 30, 2000, but not listed for ad valorem taxation by January 31, 2000. Helton's machines therefore did not fall under the grandfather clause of the statute and were in violation of § 14-306.1(a).

Helton filed this action in the superior court for Rutherford County, North Carolina, on October 30, 2000, alleging that §§ 14-306.1 and 14-298 violate the United States and North Carolina constitutions. After the original complaint was dismissed as to certain individual defendants who were not proper parties to the action, Helton filed an amended complaint naming Rutherford County Sheriff Daniel Good and Rutherford County District Attorney Jeff Hunt as defendants. The defendants removed the case to federal court in the Western District of North Carolina.

The defendants then moved for summary judgment. On July 5, 2002, the district court denied their motion and granted judgment in favor of Helton. Although the court acknowledged

that North Carolina's objective of preventing an influx of machines from South Carolina constituted a legitimate government objective, the court found that the two separate dates under the grandfather clause were not rationally related to that goal. The court also held that § 14-306.1(m) was unconstitutionally vague because it failed to define the term "warehousing." Finally, the court struck down § 14-298 because it permits the seizure and destruction of unregistered machines without any "benefit of notice or an opportunity to be heard."

We review the district court's decision de novo. *McLaughlin v. N.C. Bd. of Elections,* 65 F.3d 1215, 1221 (4th Cir.1995).

II.

[1][2] Helton argues that § 14-306.1(a)(1) violates equal protection by treating owners of machines brought into North Carolina after January 31, 2000, differently than owners of machines brought into North Carolina prior to that date. However unequal treatment alone does not constitute an equal protection violation. Lawmaking by its nature requires that legislatures classify, and classifications by their nature advantage some and disadvantage others. Helton correctly asserts that the classification in § 14- 306.1(a)(1) treats owners of gambling machines differently based on the date on which the machines were present and operating in North Carolina. Where Helton errs, however, is in the assumption that simply because such a classification seems unfair, it is also unconstitutional. "Defining the class of persons subject to a regulatory requirement--much like classifying governmental beneficiaries--'inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might

have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.'" *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315-16, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993) (quoting *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980)).

[3] Given the inherent difficulties in drawing lines and creating classifications, the Supreme Court has accorded legislative enactments a strong presumption of validity so long as they do not discriminate against any protected class or burden any fundamental right. *Id.* at 314, 113 S.Ct. 2096. A state's enactment must be upheld "so long as it bears a rational relation to some legitimate end." *Vacco v. Quill*, 521 U.S. 793, 799, 117 S.Ct. 2293, 138 L.Ed.2d 834 (1997) (citation omitted). In other words, where there are "plausible reasons" for the legislature's action, "our inquiry is at an end." *Beach Communications*, 508 U.S. at 313-14, 113 S.Ct. 2096 (1993) (quoting *Fritz*, 449 U.S. at 179, 101 S.Ct. 453).

[4][5] Courts have further recognized that a state has a "paramount interest in the health, welfare, safety, and morals of its citizens." *Johnson v. Collins Entm't Co.*, 199 F.3d 710, 720 (4th Cir.1999). And because "[t]he regulation of lotteries, betting, poker, and other games of chance touch all of the above aspects of the quality of life of state citizens" the regulation of gambling "lies at the heart of the state's police power." *Id.* It is thus beyond question that North Carolina has a legitimate government interest in the supervision of the video gaming industry.

[6][7][8] We also find that § 14-306.1(a)(1) is rationally related to that interest. Even if South Carolina had not enacted a ban creating the potential for an influx of machines into North Carolina, § 14-306.1(a)(1) would survive constitutional

scrutiny. Clearly, a state has the power to prohibit gambling altogether. *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 345, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986). But there is no mandate that a state must address its problems wholesale. Indeed, states are free to regulate by degree, one step at a time, "addressing ... the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955). North Carolina has a legitimate interest in restricting the number of new gaming machines in the state as a means of limiting the impact of gambling on the lives of its citizens or as a prelude to banning such a practice altogether. The establishment of two dates--one on which any such machine must have been in operation within the State and the other, earlier date upon which the machine must have been listed on the tax rolls rationally furthers that purpose.

Helton takes particular aim at the requirement that his gambling machines be listed for ad valorem taxation by January 31, 2000, even though they need not have been in lawful operation until June 30, 2000. Since Helton did not purchase his machines until after January 31, the legislature enacted a provision with which he claims he could not possibly comply, despite his full compliance with the June 30 requirement. None of this impugns, however, the rationality of the legislature's scheme. As the State points out, machines entering North Carolina in early 2000 but not registered on the tax rolls were highly likely to be migrating machines. Moreover, those migrating machines, even if brought into North Carolina early enough to satisfy the January 31 requirement, were less likely to satisfy the June 30 lawful operation requirement, which includes a prohibition against machines that disburse cash payouts or merchandise exceeding $10.00. N.C. Gen.Stat. § 14-306, *amended by* § 14-306(b)(2), and (d).

Although the validity of the North Carolina law is not dependent on the existence of the South Carolina ban on video gaming machines, their interconnectedness leaves no doubt as to the rationality of the enactment. The two separate dates under § 14-306.1(a)(1) serve a very specific purpose. The combination of two dates that a machine owner must meet, one for tax enrollment and the other for lawful operation and use, together work to limit the influx of new machines into North Carolina from south of its border, while protecting longtime video gaming devices. This half-a-loaf approach, while undoubtedly dissatisfying to those disadvantaged by it, is a perfectly rational way of protecting North Carolina's citizens against a quantum increase in gambling activity. We therefore reverse the district court and hold that § 14-306.1 is constitutional. [FN1]

> FN1. Helton also challenges § 14-306.1(m), arguing that it is unconstitutionally vague because it fails to define the term "warehouse." We hold that the term "warehouse" is perfectly accessible to citizens of ordinary intelligence and is not unconstitutionally vague, especially when read in the context of § 14-306.1.

III.

We turn next to N.C. Gen.Stat. § 14-298. Helton contends that § 14-298 violates the Fourteenth Amendment by providing for the destruction of video gaming machines without any process whatsoever. Under § 14-298, all sheriffs and police officers are "authorized and directed, on information made to them on oath that any ... video game machine prohibited to be used by G.S. 14-306 or G.S. 14-306.1, is in the possession or use of any person within the limits of their jurisdiction, to destroy the same by every means in their power;

and they shall call to their aid all the good citizens of the county, if necessary, to effect its destruction." N.C. Gen.Stat. § 14-298.

[9][10] The absence of due process in this provision is apparent. "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions." *Fuentes v. Shevin,* 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). The due process clause operates to protect the "use and possession of property from arbitrary encroachment--to minimize substantively unfair or mistaken deprivations of property...." *Id.* at 81, 92 S.Ct. 1983. The enforcement of § 14-298 leaves machine owners with no protections whatsoever against unfair or mistaken deprivations of their property.

[11][12] Video gaming machines that are in operation or possessed for the purpose of being put into operation are contraband unless they satisfy § 14-306.1(a)(1). Some contraband is "intrinsically illegal in character," *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 699-700, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965), and "[c]ourts will not entertain a claim contesting the confiscation of contraband per se because one cannot have a property right in that which is not subject to legal possession." *v. City of Greenwood,* 904 F.2d 302, 305 (5th Cir. 1990). However, gaming machines are not of such a nature. Under North Carolina law, video gaming machines are not inherently illegal. Possession of a video gaming machine alone does not constitute a crime. Gaming machines are therefore derivative contraband which become unlawful because of their use. *See id.* To be illegal under § 14-306.1(a), a machine must be in operation or possessed for the purpose of being put into operation. N.C. Gen.Stat. § 14-306.1(a). Moreover, the machine must have been put into

operation after June 30, 2000, and not listed for ad valorem taxation by January 31, 2000. *Id.* § 14-306.1(a)(1). Machine owners must receive some process to determine whether those conditions apply.

[13][14] Unlike per se contraband, "a property interest in derivative contraband is not extinguished automatically if the item is put to unlawful use...." *Cooper,* 904 F.2d at 305. Derivative contraband may be subject to forfeiture, but only when authorized by a statute that provides appropriate procedural safeguards. *Id.; United States v. Farrell,* 606 F.2d 1341, 1344 (D.C.Cir.1979). In a case such as this one, where one cannot determine the legality of any given machine by simply viewing its physical properties or the nature of its use, the need for process becomes apparent. A determination of whether a machine was lawfully in operation before June 30, 2000, or listed for taxation by January 31, 2000, may produce questions of fact in any given case. The statute in fact provides no opportunity for the owner of a machine to be heard in court on the lawfulness of its use before the owner's property is destroyed. And although machines complying with § 14-306.1(a)(1) are supposed to be registered with the sheriff no later than October 1, 2000, § 14-298 does not even require that the sheriff or other law enforcement officers consult such registration records before destroying machines they believe to be illegal. In fact, the literal language of the statute actually encourages officers to round up a posse and destroy such machines without consulting any registration records.

Of course states can lawfully ban gaming machines and subject them to forfeiture. Unlike § 14-298, however, the forfeiture statutes of other states provide at least some modicum of process. *See, e.g.,* S.C.Code § 12- 21-2712 (any allegedly illegal gaming machine must be seized and immediately taken before a magistrate to determine if the

machine is prohibited by statute); 720 Ill. Comp. Stat. 5/28-5 (2003) (devices used unlawfully for gambling subject to seizure but cannot be destroyed unless owner is afforded "a forfeiture hearing to determine whether such property was a gambling device at the time of seizure"); La. R.S. § 15:1356 (2003) (property used in violation of drug racketeering statutes subject to civil forfeiture, but seizure only proper "upon court process," "incident to a lawful arrest or search," or when property subject to seizure was subject of prior judgment based on this Section).

[15] Defendants argue that we should construe the statute as providing due process protections, because the general practice in enforcing § 14-298 is to obtain a court order before any destruction occurs. Whether this is indeed the general practice is not apparent from the record. However, "[t]he canon favoring constructions of statutes to avoid constitutional questions does not license a court to usurp the policymaking and legislative functions of duly elected representatives." *Heckler v. Mathews,* 465 U.S. 728, 741, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984). Any savings construction here would be at odds with the statute, whose language encourages defiance of, not compliance with, due process guarantees. Although a court will "often strain to construe legislation so as to save it against constitutional attack," *Scales v. United States,* 367 U.S. 203, 211, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961), it will not do so to the point of "judicially rewriting" the legislation. *Aptheker v. Secretary of State,* 378 U.S. 500, 515, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964). [FN2]

> FN2. The statute in question was first passed in 1793. North Carolina appears to suggest that the unusual wording of the provision owes to the statute's antiquity. While this may be so, North Carolina has amended the statute on several occasions and has yet to cure the constitutional difficulties.

> The State also suggests that we interpret the phrase "by every means in their power," to prohibit destructions which transgress due process. Combined, however, with the immediately succeeding mandate that officers enlist the aid of a posse, if necessary, to effect the destruction, the words more aptly suggest that an officer is authorized to destroy an allegedly illegal machine by every physical means possible.

[16] We need not go so far in this case to say what kind of process North Carolina must provide to machine owners because § 14-298 authorizes the destruction of machines with no process at all. The district court was correct to conclude that § 14-298 "provides law officers the power to destroy the video game machines without adequate process," and we affirm its judgment.

IV.

For the foregoing reasons, the judgment of the district court is

AFFIRMED IN PART AND REVERSED IN PART.

NIEMEYER, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts I and II of the majority opinion and dissent from Parts III and IV. Part II upholds, against an equal protection attack, N.C. Gen.Stat. § 14-306.1, which bans video gaming machines put into use after a specified date. Subsequent sections of the North Carolina statute declare such machines a public nuisance and make their use or possession a crime. But in Part III, the majority concludes that a user or possessor of such contraband video machines is entitled to a

hearing before the contraband can be destroyed. Because N.C. Gen.Stat. § 14-298 authorizes a law enforcement officer to destroy prohibited machines without a hearing, the majority finds that it denies owners due process. In reaching that conclusion, the majority assumes, erroneously I believe, that the banned machines are not per se contraband, but "derivative contraband which become unlawful because of their use." *Ante* at 248. I respectfully disagree with the majority's characterization of the North Carolina statute.

North Carolina makes illegal the operating or possessing for the purpose of operating any new video gaming machine that was not "grandfathered in" by registration and operation before certain stated dates. *See* N.C. Gen.Stat. § 14-306.1(a). The same section also prohibits warehousing any such video gaming machines. *Id.* § 14-306.1(h) (formerly § 14-306.1(m)). Section 14-308 then declares the maintenance or keeping of any prohibited machine a "public nuisance," and § 14-309 makes a violation of § 14-306.1, prohibiting the use and possession of video gaming machines, a crime. Any law enforcement officer, who is provided information on oath that a prohibited video gaming machine exists in the officer's jurisdiction, is authorized to seize and destroy the machine. *Id.* § 14-298.

There can be no doubt that when the use and possession of gaming machines are banned and made illegal, they are per se contraband. *See One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 699, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965) (defining per se contraband as "objects the possession of which, without more, constitutes a crime"). [FN1] Because North Carolina has made the use, the possession for use, and the warehousing of prohibited video gaming machines illegal and therefore subject to destruction as contraband, I agree with the majority's observation that in such circumstances "courts will

not entertain a claim contesting the confiscation of contraband per se because one cannot have a property right in that which is not subject to legal possession." *Ante* at 248 (quotation marks and citation omitted). Contraband does not enjoy the protections of the due process clause. *Id.; see also Bennis v. Michigan,* 516 U.S. 442, 447, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996) (upholding State's forfeiture of innocent owner's automobile used by a third person illegally on a theory that the "thing is here primarily considered as the offender or rather the offence is attached primarily to the thing" (quotation marks and citation omitted)); *id.* at 456, 116 S.Ct. 994 (Thomas, J., concurring) ("[U]nder a different statutory regime, the State might have authorized the destruction of the car instead [of its forfeiture and sale]"). [FN2]

FN1. The majority, appearing to overlook §§ 14-308 and 14-309, states that "[u]nder North Carolina law, video gaming machines are not inherently illegal [and][p]ossession of a video gaming machine alone does not constitute a crime." *Ante* at 248.

FN2. To be sure, the owner of a *lawful* video gaming machine has a property interest to which attach the usual constitutional and statutory protections. Section 14-298, which authorizes the destruction of only contraband in which one can assert no cognizable property interest, does nothing to diminish the legal protections afforded to one's property interest in a lawful machine. Should a law enforcement officer mistake lawful property for contraband and destroy it under § 14-298, the aggrieved property owner may pursue appropriate remedies for a State's mistaken or unlawful taking and destruction of property. But concern for the hypothetical owner of lawful property who is subjected to a *mistaken* application of § 14-298

is not a basis for casting aside the State's choice to destroy *contraband* without observing procedures afforded to cognizable *property*.

Because the use and possession of banned machines are illegal and their existence is a public nuisance, I would not only uphold the constitutionality of § 14-306.1 but also uphold the constitutionality of § 14-298, which authorizes the destruction of banned machines without a hearing. Accordingly, I would reverse entirely the judgment of the district court.

208 F.Supp.2d 597
(Cite as: 208 F.Supp.2d 597)

United States District Court,
W.D. North Carolina,
Asheville Division.

Hicks William HELTON, d/b/a B & H Video,
Plaintiff,
v.
Daniel J. GOOD, Sheriff of Rutherford County; and
Jeff Hunt, Rutherford County
District Attorney, Defendants.

No. CIV. 1:01CV288.

July 5, 2002.

Owner of video gaming machines brought suit against county sheriff and district attorney seeking declaratory judgment that statutes providing for destruction of machines and prosecution of their owners was unconstitutional. Defendants removed action. On motions of defendants to dismiss and/or for summary judgment, and plaintiff's motion to remand, the District Court, Thornburg, J., held that: (1) motion to remand was untimely; (2) owner had standing to sue under Declaratory Judgment Act; and (3) provisions of statutes violated equal protection and due process.

Summary judgment for plaintiff.

West Headnotes

[1] Removal of Cases 107(1)

Motion to remand based on untimeliness of removal would itself be denied as untimely when not filed within 30 days of notice of removal, as such motion was not based on a lack of subject matter jurisdiction, to which no time limit applied. 28 U.S.C.A. § 1447(c).

[2] Declaratory Judgment 362

In action seeking only declaratory judgment that statutes at issue were unconstitutional, immunity-related grounds advanced by defendant sheriff and district attorney could not provide basis for dismissal; Declaratory Judgment Act provided for declaration of rights "whether or not further relief is or could be sought." 28 U.S.C.A. § 2201.

[3] Federal Civil Procedure 1825

When a motion to dismiss challenges the factual basis for subject matter jurisdiction, the burden of proving subject matter jurisdiction is on the plaintiff. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

[4] Federal Civil Procedure 1825

[4] Federal Civil Procedure 1831

[4] Federal Civil Procedure 1832

In determining on a motion to dismiss whether factual basis for subject matter jurisdiction exists, the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment;

district court should apply the standard applicable to a motion for summary judgment, under which the nonmoving party must set forth specific facts beyond the pleadings to show that a genuine issue of material fact exists. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

[5] Declaratory Judgment 299.1

When seeking declaratory relief, a plaintiff must show actual present harm or a significant possibility of future harm in order to demonstrate the need for pre-enforcement review. 28 U.S.C.A. § 2201.

[6] Declaratory Judgment 299.1

To determine whether a plaintiff has standing to adjudicate an actual controversy, requisite for relief under the Declaratory Judgment Act, one must ask whether the parties have adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment even though the injury-in-fact has not yet been completed. 28 U.S.C.A. § 2201.

[7] Declaratory Judgment 300

Owner of video gaming machines had standing under Declaratory Judgment Act to challenge constitutionality of statute imposing criminal penalties for use of new gaming machines and providing for their destruction by county sheriffs without prior notice and hearing; actual case and controversy existed as owner had no choice but to remove machines from operation upon enactment of law, owner was in violation of law by presumably "warehousing" machines in county rather than removing them to another State, and owner faced threat of immediate prosecution or destruction even though no threat had been expressly made. West's N.C.G.S.A. §§ 14-298, 14-306.1.

[8] Constitutional Law 250.1(2)

[8] Gaming 63(1)

Statute prohibiting operation and undefined "warehousing" of certain "new" video gaming machines not in operation in state by date certain, but also requiring that all legal machines have been listed on tax rolls several months earlier, was not rationally related to State's legitimate interest in preventing influx of machines from adjoining state that had outlawed them approximately 12 days before its enactment, and thus violated equal protection, even though State could have banned machines altogether; owners of machines acquired during gap period before law's enactment could not possibly have complied with law and acted in reliance on law as it existed at time of their purchases. U.S.C.A. Const.Amend. 14; West's N.C.G.S.A. §§ 14-298, 14-306.1.

[9] Constitutional Law 213.1(2)

Under rational basis test for equal protection analysis, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous; legislation that is rationally related to a legitimate governmental interest must be upheld. U.S.C.A. Const.Amend. 14.

[10] Constitutional Law 197

To fall within the ex post facto prohibition, a law must be retrospective--that is, it must apply to events occurring before its enactment--and it must disadvantage the offender affected by it, by altering the definition of criminal conduct. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[11] Constitutional Law 197

The Ex Post Facto Clause applies only to laws which are punitive, and thus criminal. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[12] Constitutional Law 253(4)

[12] Constitutional Law 320

[12] Gaming 63(1)

Statute prohibiting possession or warehousing of certain new video game machines acquired before its enactment, because of the failure to register them on tax roles as of several months earlier, required owners to take action which was not required at time it could have been performed, and also providing law officers with power to destroy video game machines without adequate process, violated due process. U.S.C.A. Const.Amend. 14; West's N.C.G.S.A. § 14-306.1(a)(1)(a-b).

[13] Gaming 63(.5)

Statute which empowered the Sheriff to round up a posse and destroy gaming machines on sight, based solely on an oath, is punitive on its face, rather than justifiable as civil forfeiture measure for certain banned machines. West's N.C.G.S.A. § 14-306.1(a)(1)(a-b). Luther Donald Starling, Jr., Daughtry & Starling, Smithfield, NC, for plaintiff.

Mark J. Pletzke, NC Dept. of Justice, Raleigh, NC, Scott D. MacLatchie, Womble, Carlyle, Sandridge & Rice, Charlotte, NC, for defendants.

MEMORANDUM AND ORDER

THORNBURG, District Judge.

THIS MATTER is before this Court on motion of Defendant Jeff Hunt to dismiss and for summary judgment, on motion of Defendant Daniel J. Good for summary judgment, and on motion of Plaintiff Hicks William Helton to remand the case to state court. For the reasons stated below, Helton's motion to remand is denied; however, the Defendants' motions are likewise denied, and judgment will be granted for the Plaintiff.

I. BACKGROUND

The Plaintiff initially filed this action in the General Court of Justice, Superior Court Division of Rutherford County, North Carolina, on October 30, 2000, against Good; the State of North Carolina; the North Carolina Attorney General, Michael Easely; the Secretary of the North Carolina Department of Crime Control and Public Safety, David E. Kelley; and the Secretary of the Department of Revenue, Muriel K. Offerman, alleging that certain provisions of the North Carolina General Statutes dealing with the possession and use of a defined class of "video gaming machines" violate both the North Carolina and United States Constitutions. Count Two of the complaint, which sets forth a motion for a preliminary injunction to prohibit those laws from being enforced against Plaintiff or his property, has been previously denied by the state court. *See* Plaintiff's Notice of Motion and Motion to Remand, filed January 28, 2002, at 3.

The North Carolina General Assembly amended those portions of North Carolina's criminal code dealing with "slot machines and other devices" in July 2000 in response to new

laws enacted in South Carolina outlawing video poker. N.C. Sess. Laws 2000-151; N.C. Gen.Stat. § 14-306 **(defining "slot machines and other devices.")**. Session Law 2000-151 defines "video gaming machine" in several ways. N.C. Gen.Stat. § 14-306.1(c). It includes the definition of "slot machine or device" from § 14-306(a). [FN1] The definition also includes a list of examples of "video gaming machines" and the general description, "[a] video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols not dependent on the skill or dexterity of the player." [FN2] N.C. Gen.Stat. § 14-306.1(c)(8). The statute further provides that "[f]or purposes of this section, a video gaming machine includes those that are within the scope of the exclusion provided in G.S. 14-306(b)(2), but does not include those that are within the scope of the exclusion provided in G.S. 14-306(b)(1)". [FN3]

> FN1. Section 306(a) provides:
> Any machine, apparatus or device is a slot machine or device within the provisions of G.S. 14-296 through 14-309, if it is one that is adapted, or may be readily converted into one that is adapted, for use in such a way that, as a result of the insertion of any piece of money or coin or other object, such machine or device is caused to operate or may be operated in such manner that the user may receive or become entitled to receive any piece of money, credit, allowance or thing of value, or any check, slug, token or memorandum, whether of value or otherwise, or which may be exchanged for any money, credit, allowance or any thing of value, or which may be given in trade, or the user may secure additional chances or rights to use such machine, apparatus or device; or any other machine or device designed and manufactured primarily for use in connection with gambling and which machine or device

is classified by the United States as requiring a federal gaming device tax stamp under applicable provisions of the Internal Revenue Code. This definition is intended to embrace all slot machines and similar devices except slot machines in which is kept any article to be purchased by depositing any coin or thing of value, and for which may be had any article of merchandise which makes the same return or returns of equal value each and every time it is operated, or any machine wherein may be seen any pictures or heard any music by depositing therein any coin or thing of value, or any slot weighing machine or any machine for making stencils by the use of contrivances operated by depositing in the machine any coin or thing of value, or any lock operated by slot wherein money or thing of value is to be deposited, where such slot machines make the same return or returns of equal value each and every time the same is operated and does not at any time it is operated offer the user or operator any additional money, credit, allowance, or thing of value, or check, slug, token or memorandum, whether of value or otherwise, which may be exchanged for money, credit, allowance or thing of value or which may be given in trade or by which the user may secure additional chances or rights to use such machine, apparatus, or device, or in the playing of which the operator does not have a chance to make varying scores or tallies.
N.C. Gen.Stat. § 14-306(a).

FN2. The List reads, "(1) A video poker game or any other kind of video playing card game. (2) A video bingo game. (3) A video craps game. (4) A video keno game. (5) A video lotto game. (6) Eight liner. (8)Pot-of-gold." N.C. Gen.Stat. § 14-306.1(c)(1-7).

FN3. Section 14-306(b) provides,

The definition contained in subsection (a) of this section ... does not include coin-operated machines, video games, pinball machines, and other computer, electronic or mechanical devices that are operated and played for amusement, that involve the use of skill or dexterity to solve problems or tasks or to make varying scores or tallies and that:

(1) Do not emit, issue, display, print out, or otherwise record any receipt, paper, coupon, token, or other form of record which is capable of being redeemed, exchanged, or repurchased for cash, cash equivalent, or prizes, or award free replays; or

(2) In actual operation, limit to eight the number of accumulated credits or replays that may be played at one time and which may award free replays or paper coupons that may be exchanged for prizes or merchandise with a value not exceeding ten dollars ($10.00), but may not be exchanged or converted to money.

N.C. Gen.Stat. § 14-306(b).

Under the terms of Session Law 2000-151, "[i]t shall be unlawful for any person to operate, allow to be operated, place into operation, or keep in that person's possession for the purpose of operation any video gaming machine as defined [in the section]." N.C. Gen.Stat. § 14-306.1(a). The amendment also mandates that "the owner of any video game which is regulated [by the statute] shall register the machine with the Sheriff of the county in which the machine is located ...." N.C. Gen.Stat. § 14.306.1(i). Furthermore, Session Law 2000-151 declares, "it is unlawful to warehouse any video gaming machine except in [circumstances involving manufacture of the machines in state.]." N.C. Gen.Stat. § 14-306.1(h). The term "warehouse" is not defined in relation to Session Law

2000-151. The law contains a "grandfather clause" for any machines which were (1) "[l]awfully in operation, and available for play, within this State on or before June 30, 2000," and (2) "[l]isted in this State by January 31, 2000 for *ad valorem* taxation for the 2000-2001 tax year." N.C. Gen.Stat. § 14-306.1(b) **(entitled "Ban on New Machines")**. Operation and possession of such "old" machines, if otherwise legal, is permitted. Not only does Session Law 2000-151 impose criminal penalties for the operation, possession with the intent to operate, or warehousing of new machines, it also makes applicable another section of the North Carolina General Statutes which provides,

> All sheriffs and officers of police are hereby authorized and directed, on information made to them on oath that any ... video game machine prohibited to be used by ... [N.C. Gen.Stat. §] 14-306.1, is in the possession or use of any person within the limits of their jurisdiction, to destroy the same by every means in their power; and they shall call to their aid all the good citizens of the county, if necessary, to effect its destruction.

N.C. Gen.Stat. § 14-298; *see also,* N.C. Gen.Stat. § 14-308-309 **(making violation of these sections a Class 1 misdemeanor on the first offense, a Class I felony for a second offense, and a Class H felony for any additional offenses, and making any violation of those sections involving 5 or more machines a class G felony)**.

Plaintiff purchased 70 new machines sometime prior to the passage of Session Law 2000-151, but after January 31, 2000, brought them to Rutherford County and placed them into operation. As such, his machines were, "lawfully in operation and available for play, within the State before June 30," but not

listed for *ad valorom* taxation by January 31. The parties agree that the machines Plaintiff purchased qualify as "video gaming machines" but do not fall within the grandfather clause. Both the Plaintiff and his property are in violation of N.C. Gen.Stat. § 14-306.1 and subject to prosecution or destruction, respectively.

After the original complaint was filed in state court, the State and the individual Defendants who serve on the Council of State moved for dismissal and/or summary judgment on the grounds that they were not proper parties to the action. The state court granted those motions, finding that Sheriff Good and Jeff Hunt were the proper Defendants, but denied Plaintiff's motion for a preliminary injunction as set forth in Count Two of the complaint. Thereafter, Plaintiff filed an amended complaint on September 13, 2001, naming Good and Hunt as party Defendants. On December 13, 2001, admittedly within 30 days of the date on which he was first served in this action, Hunt filed a notice of removal in which Good joined.

II. PLAINTIFF'S MOTION TO REMAND

The Plaintiff argues that although Hunt's notice of removal was timely, Good's failure to file a notice of removal within 30 days of the date on which he was served with the original complaint waived his right to removal. *See,* 28 U.S.C. § 1446. Based on this waiver, Good cannot now consent to Hunt's removal and remand back to the state court is required. This argument raises a rather thorny issue which is still undecided in the Fourth Circuit. *See, McKinney v. Bd. of Trustees of Mayland Comty. College,* 955 F.2d 924, 926 n. 3 (4th Cir.1992) **(noting in *dicta* that in this situation removal is not allowed)**; *but see, Freeman v. Bechtel,* 936 F.Supp. 320, 325-26 (M.D.N.C.1996) **(holding that removal is allowed in**

this situation and relying on *McKinney*, but not commenting on the *dicta*).

[1] This Court is not compelled to attempt to resolve this so called "later-served defendant" issue. As the Defendants correctly observe, Plaintiff's motion to remand is untimely. Under the applicable statute, "[a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal ...." 28 U.S.C. § 1447(c). A motion to remand based on the untimeliness of removal is not based on a lack of subject matter jurisdiction. *Wisconsin Dept. of Corrections v. Schacht,* 524 U.S. 381, 392, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998) **("In substance, the section differentiates between removals that are defective because of lack of subject- matter jurisdiction and removals that are defective for some other reason, *e.g.*, because the removal took place after relevant time limits had expired.")**. Therefore, Plaintiff's motion to remand based on § 1447(c) is denied as untimely.

III. DEFENDANT HUNT'S MOTION TO DISMISS

A. Immunity

[2] In addition to the substantive grounds for summary judgment raised by both Defendants and dealt with below, Hunt raises several immunity-related grounds as bases for dismissal of the cōmplaint. These include sovereign immunity, the Eleventh Amendment to the United States Constitution, qualified immunity, and absolute prosecutorial immunity. These arguments miss the mark. At this time, Plaintiff seeks only a declaratory judgment that the statutes at issue are unconstitutional. First Amended Complaint; Fed. R. Civ. P 57. Because the case was removed to this Court based on

federal question jurisdiction, the Declaratory Judgment Act applies. 28 U.S.C. § 2201. That statute provides,

> [i]n a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

Id. As such, Hunt's argument that Plaintiff lacks standing is the only relevant basis raised for dismissal of this action.

B. Standing

The Declaratory Judgment Act has been consistently utilized to determine the constitutionality of criminal statutes. *See, e.g., National Rifle Ass'n of America v. Magaw,* 132 F.3d 272 (6th Cir.1997); *Minnesota Citizens Concerned for Life v. Federal Election Comm'n,* 113 F.3d 129 (8th Cir.1997); *Pic-A-State, Pa., Inc. v. Reno,* 76 F.3d 1294 (3rd Cir.1996); *Watson v. Buck,* 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1416 (1941). In order to establish standing--and thus subject matter jurisdiction--under the Declaratory Judgment Act, the Plaintiff must show (1) a case of actual controversy, and (2) an independent source of federal jurisdiction. 28 U.S.C. § 2201. Here, the amended complaint alleges that application of the statutes at issue would violate the United States Constitution which satisfies the second prong of this test. Complaint, ¶ 13.

While in the case of an ongoing, state-court prosecution, federal courts will abstain from granting declaratory relief, nothing will prevent such action in the absence of an extant

state court proceeding. *Younger v. Harris,* 401 U.S. 37, 41-44, 46, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); *Samuels v. Mackell,* 401 U.S. 66, 72-73, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971).

[3][4] When a Rule 12(b)(1) motion challenges the factual basis for subject matter jurisdiction, the burden of proving subject matter jurisdiction is on the plaintiff. *Adams v. Bain,* 697 F.2d 1213, 1219 (4th Cir.1982). In determining whether jurisdiction exists, the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment. *Id.; Trentacosta v. Frontier Pacific Aircraft Indus., Inc.,* 813 F.2d 1553, 1558 (9th Cir.1987). The district court should apply the standard applicable to a motion for summary judgment, under which the nonmoving party must set forth specific facts beyond the pleadings to show that a genuine issue of material fact exists. *Id.,* at 1559 (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). The moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law. *Id.,* at 1558; *Richmond, Fredericksburg, & Potomac R.R. Co. v. United States,* 945 F.2d 765, 768 (4th Cir.1991).

[5][6] "Declaratory judgements are typically sought before a completed 'injury-in-fact' has occurred, but must be limited to the resolution of an 'actual controversy.'" *See, National Rifle Ass'n,* 132 F.3d at 279 (citing *Pic-A-State Pa.,* 76 F.3d at 1298; *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 239-40, 57 S.Ct. 461, 81 L.Ed. 617 (1937)). "When seeking declaratory ... relief, a plaintiff must show actual present harm or *a significant possibility of future harm* in order to demonstrate the need for pre-enforcement review." *Id.* (citing

Bras v. California Pub. Utilities Comm'n, 59 F.3d 869, 873 (9th Cir.1995)) (emphasis added).

> Although in regard to criminal statutes, courts are wary of compromising the public interest in efficient law enforcement by intervening prior to prosecution and foreshortening the prosecutor's action, courts have allowed pre-enforcement review of a statute with criminal penalties *when there is a great and immediate danger of irreparable loss.*

Id. (citing *Watson,* 313 U.S. at 400, 61 S.Ct. 962) (emphasis added). "[P]re-enforcement review is usually granted under the Declaratory Judgment Act when a statute '*imposes costly, self-executing compliance burdens* ....'" *Id.* (citing *Minnesota Citizens Concerned for Life,* 113 F.3d at 132) (emphasis added).

> To determine whether a plaintiff has standing to adjudicate an 'actual controversy,' requisite for relief under the Declaratory Judgment Act, one must ask whether the parties have '*adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment* 'even though the injury-in-fact has not yet been completed.

Id., at 280 (citing *Golden v. Zwickler,* 394 U.S. 103, 108, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969); *Michigan State Chamber of Commerce v. Austin,* 788 F.2d 1178, 1181 (6th Cir.1986)) (emphasis added).

[7] Application of this standard to the instant case leads to the conclusion that Plaintiff does present an "actual

controversy." A fair reading of the facts in the amended complaint and the other, undisputed facts presented in the motions and responses thereto is that Plaintiff is presently in violation of the statute by virtue of his possession of the video gaming machines within the State of North Carolina. Complaint, at 3-4; Defendant Hunt's Motion to Dismiss and for Summary Judgment, filed December 17, 2001, at 2; Defendant Good's Motion for Summary Judgment, filed December 14, 2001, at 4-5. Plaintiff has not registered the gaming machines with Good, as the Sheriff of Rutherford County. Defendant Good's Motion, at 30; Defendant Hunt's Motion, at 6. Although the facts do not indicate where the Plaintiff is storing the 70 gaming machines, if he is keeping some or all of them in one place, that would presumably qualify as "warehousing." *See,* Merriam-Webster Online Dictionary, **(defining** "warehouse" as "to deposit, store, or stock in or as if in [a structure or room for the storage of merchandise or commodities]."). Furthermore, the Plaintiff purchased the machines with the intent of operating them, he placed them into operation, and maintains the intention to operate them in the future. Complaint, at 3. As such, he is presently in violation of N.C. Gen.Stat. § 14-306.1. Furthermore, under the terms of § 14-298, he is subject to have the Sheriff enter the location where the machines are currently stored, possibly with the aid of a *posse comitatus,* and destroy the machines solely on the basis of an oath and without benefit of notice or an opportunity to be heard. [FN4]

> FN4. This is not to imply that Good, or any other North Carolina law enforcement officer would engage in such a practice. It is merely an observation on the terms of the statutes at issue. It appears that the practice in effectuating § 14-298 is to obtain an order from the court with jurisdiction over a pending criminal or civil matter before such destruction occurs. *State v. Campbell,* 79 N.C.App. 468, 339 S.E.2d 674 (1986).

The Plaintiff faces the significant possibility of future harm and has legal interests adverse to those of the officer charged with implementing the statute which are immediate and real enough to warrant the issuance of a declaratory judgment. Hunt argues that Plaintiff has not alleged that he has been threatened with imminent prosecution for his action or failure to act. Exhibit C, Affidavit of Jeff Hunt, *attached to* Defendant Hunt's Motion. Certainly, had either Defendant made an express threat of prosecution, the "actual controversy" requirement would be met. *Younger,* 401 U.S. at 42, 91 S.Ct. 746. Likewise, where the threat of prosecution is "imaginary or speculative" no such controversy exists. *Id.* Here, however, the possibility of prosecution is very real, even if no threat has yet been expressly made. [FN5] Once the 2000 amendment to these statutes became law, Plaintiff had no choice but to remove the machines from this State to a location where they were legal or face criminal penalties and/or the destruction of his property. This qualifies as a "costly, self-executing compliance burden." Thus, the Plaintiff has established a case of actual controversy and has standing to bring this action. The Court now turns to the merits of the Plaintiff's claims.

> FN5. It is worth noting that Hunt did not disavow the intention to enforce the provisions of Session Law 200-151 against Plaintiff. *See* Hunt Affidavit; *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 302, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) (**"the State has not disavowed any intention of invoking the criminal penalty provision against [plaintiffs in a Declaratory Judgment Action]."**); *Salvation Army v. Dep't of Cmty. Affairs of State of N.J.,* 919 F.2d 183, 192 (3rd Cir.1990) (**"the current record reflects not only the absence of a threat of enforcement but an express assurance that there will be no enforcement against [plaintiff]"**).

IV. SUMMARY JUDGMENT MOTIONS

The Defendants have moved for summary judgment, arguing that Session Law 2000-151 is constitutional on its face. The Plaintiff argues that the law violates both the equal protection and due process clauses of the Fourteenth Amendment.

Summary judgment is appropriate when there is no genuine issue of material fact and judgment for the moving party is warranted as a matter of law. Fed.R.Civ.P. 56(c). A genuine issue exists if a reasonable jury considering the evidence could return a verdict for the nonmoving party. *Shaw v. Stroud,* 13 F.3d 791, 798 (4th Cir.1994) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). By reviewing substantive law, the court may determine what matters constitute material facts. *Anderson, supra.* Here, the parties agree that no material issues remain in dispute. Nothing in the record indicates otherwise to the Court. "[This Court's] inquiry, therefore, ... extends only to the application of the law in this case." *Metropolitan Life Ins. Co. v. Pettit,* 164 F.3d 857, 860 (4th Cir.1998).

In the amended complaint and in opposition to Defendants' summary judgment motion, Plaintiff advances two different bases from which he argues that Session Law 2000-151 violates the United States Constitution and the corresponding provisions of the North Carolina Constitution. [FN6] Insofar as the North Carolina Constitution provides any additional protection to Plaintiff on these matters, the Court will decline to exercise its supplemental jurisdiction over these claims. [FN7] 28 U.S.C. § 1367(c). Plaintiff argues that because the law requires machines which were in operation on June 30, 2000, to have been registered in the *ad valorom* tax roles as of January 31, 2000, it violates both the equal

protection and the due process clauses of the Fourteenth Amendment and of the State Constitution and is unconstitutional on its face. U.S. Const. amend. XIV, § 1; N.C. Const. art. I, § 19.

> FN6. Plaintiff also argues that the law violated Article XIV, § 3 of the North Carolina Constitution. That section provides, in pertinent part:
>
> Whenever the General Assembly is directed or authorized by this Constitution to enact ... general laws uniformly applicable throughout the State ... no special or local act shall be enacted concerning the subject matter directed or authorized to be accomplished by general or uniformly applicable laws, and every amendment or repeal of any law relating to such subject matter shall also be general and uniform in its effect throughout the State. General laws may be enacted for classes defined by population or other criteria.
>
> On its face, Session law 2000-151 plainly does not apply to a limited set of localities. Rather it defines classes by "other criteria." Plaintiff's claim based on this provision is dismissed.
>
> FN7. While the North Carolina Courts have declared that Article One, Section 19 of the State Constitution contains the "functionally equivalent[s]" to the Equal Protection and Due Process clauses of the 14th Amendment, they have maintained that "in the construction of the provision of the State Constitution, the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is, though highly persuasive, not binding ...." *White v. Pate,* 308 N.C. 759, 765-66, 304

S.E.2d 199, 203 (1983) (citations omitted); *State v. Chisholm,* 135 N.C.App. 578, 583, 521 S.E.2d 487, 491 (1999).

[8][9] The parties agree that nothing about the statute discriminates against any protected class or affects any fundamental right for purposes of equal protection analysis. Defendant Hunt's Motion, at 16; Defendant Good's Motion, at 6-7; Plaintiff's Motion to Remand and Opposition to Defendants' Motions, at 8-10; *see also, Thomasson v. Perry,* 80 F.3d 915, 927 (4th Cir.1996). As such, it is only subject to "rational basis" review. *Thomasson, supra.* Because Plaintiff argues that his substantive due process rights have been violated, both claims involve the application of the same test. *See, Holland v. Keenan Trucking Co.,* 102 F.3d 736, 740 (4th Cir.1996) **("the basic test remains the same regardless of the 'retroactive' nature of a statute: whether the statute is rationally related to a legitimate legislative purpose.")**. Under this test, "a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer v. Evans,* 517 U.S. 620, 632, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). Legislation that "is rationally related to a legitimate governmental interest" must be upheld. *U.S. Dep't of Agriculture v. Moreno,* 413 U.S. 528, 533, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973). As the Supreme Court recognized in *Romer,* "most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer,* 517 U.S. at 631, 116 S.Ct. 1620 (*citing Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 271-72, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979); *F.S. Royster Guano Co. v. Commonwealth of Virginia,* 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920)).

> [Rational basis review] "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," and those challenging the rationality of a legislative classification have the burden to negate "every conceivable basis" which might support it.

Mitchell v. Apfel, 19 F.Supp.2d 523, 527 (W.D.N.C.1998) (citing *Federal Communications Comm'n v. Beach Communications, Inc.,* 508 U.S. 307, 313-16, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)).

Here, the parties agree that the State was pursuing a legitimate interest, that is, the regulation of gambling. *See, e.g., State v. McCleary,* 65 N.C.App. 174, 181, 308 S.E.2d 883, 889 (1983) ("It has long been held in North Carolina that the legislature, through the exercise of its police power, may prohibit or regulate gambling."). Specifically, Session Law 2000-151 sought to discourage an influx of "video gaming machines" from South Carolina, which banned them altogether beginning July 1, 2000. Defendants argue, and two other courts have found, that "it was the purpose of the General Assembly to stop an anticipated flood of video poker machines from leaving South Carolina and being moved to North Carolina." Exhibit B, Order of Superior Court Judge Dennis J. Winner, *attached to* Defendant Good's Motion, at 2; *see also, Henderson Amusement, Inc. v. Good,* 172 F.Supp.2d 751, 754 (W.D.N.C.2001) **("The undisputed origin of such legislation was that lawmakers foresaw a migration in the summer of 2000 of video gaming machines from South Carolina ....")**.

Given that the General Assembly could legitimately regulate, or even prohibit, gambling, including video gaming machines by banning the operation of such machines altogether, the question becomes whether or not Session Law

2000-151 is rationally related to that interest. *Moreno, supra.* "The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process ...." *Holland,* 102 F.3d at 740 (citations omitted). Considering the fact that Session Law 2000-151 was not enacted until July 13, 2000, twelve days after the South Carolina ban went into effect, the relationship between the grandfather clause and the purported interest of the State is difficult to discern. The establishment of two dates--one on which any such machine must have been in operation within the State and the other, earlier date before which any such machine must have been listed on the tax rolls--is not rationally related to the objective of preventing the influx of such machines into North Carolina. Nor is it in reaction to or in anticipation of a complete ban on them in South Carolina, where the law establishing those two dates was enacted after the South Carolina ban went into effect and two weeks after one date and four months after the other. The Plaintiff in this case, and others similarly situated, purchased video gaming machines, brought them into North Carolina, and placed them into operation in reliance on the law as it existed during first half of 2000. N.C. Gen.Stat. § 14-295, *et seq.* (1999); *see, Landgraf v. USI Film Products,* 511 U.S. 244, 269, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) ("'**every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability,** in respect to transactions or considerations already past, must be deemed retrospective ....' ") (quoting *Society for Propagation of the Gospel v. Wheeler,* 22 F. Cas. 756 (C.C.D.N.H.1814) (No. 13,156)). Those who brought the gaming machines into the State after January 31, 2000, had no duty to list them for *ad valorem* taxation until January of 2001. N.C. Gen.Stat. § 105-285. There is no rational explanation which the Defendants have presented or of which the Court can conceive

to explain the inclusion of a condition with which Plaintiff and others similarly situated could not possibly have complied.

[10] Furthermore, parts of Session Law 2000-151 come perilously close to violating the *ex post facto* clause of the United States Constitution. U.S. Const. art. I, § 10, cl. 1. That clause provides, "[n]o State shall ... pass any ... ex post facto [l]aw ...." *Id.* "It is settled, by decisions of [the Supreme Court] so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done ... is prohibited *ex post facto.*" *Dobbert v. Florida,* 432 U.S. 282, 292, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977) (citations omitted); *see also, Collins v. Youngblood,* 497 U.S. 37, 42, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990). "[T]he central concerns of the *Ex Post Facto* Clause [are] the lack of fair notice and governmental restraint...." *Lynce v. Mathis,* 519 U.S. 433, 441, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997) (internal quotations omitted); *accord, Landgraf, supra.* "To fall within the *ex post facto* prohibition, a law must be retrospective--that is, it must apply to events occurring before its enactment--and it must disadvantage the offender affected by it, by altering the definition of criminal conduct...." *Id.* (internal quotations and citations omitted).

[11][12][13] Because it contains a prohibition on possession of video gaming machines the undefined term "warehousing," and it provides law officers the power to destroy the video game machines without adequate process, N.C. Gen.Stat. § 14-306.1(a)(1)(a-b) fails the requirements of due process. While the ex post facto clause applies only to laws which are punitive, and thus criminal, the consequences for Plaintiff and others similarly situated who violate Session Law 2000-151 are punitive. *See, UnitedStates v. O'Neal,* 180 F.3d 115, 121 (4th Cir.1999) (**"'Punishment' and 'penalty' are constitutional terms of art, definedin contra distinction**

to laws that are 'civil,' ... or involve regulation of a present situation.") (internal citations omitted). They create the immediate possibility of a fine or imprisonment because of the failure to take an action which was not required at the time it could have been performed--in Plaintiff's case, a class G felony punishable by a term of imprisonment between 8 and 36 months. N.C. Gen.Stat. § 15A-1340.17. It might be argued that the seizure provision of § 14-298 constitutes civil forfeiture, but a statute which empowers the Sheriff to round up a posse and destroy machines on sight, based solely on an oath, is punitive on its face. *See, Hudson v. United States,* 522 U.S. 93, 98-100, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997); *United States v. Ursery,* 518 U.S. 267, 277, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996); *United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 362-63, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984); *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-169, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). This conclusion supports the determination that § 14-306.1(a)(1)(a-b) violates the Fourteenth Amendment.

The absence of a definition for the term "warehouse," the application of § 14-298 to video game machines, and the retroactive applicability of the law support the conclusion that Session Law 2000-151 is not rationally related to the governmental object of preventing an influx of video gaming machines into North Carolina in response to South Carolina's ban. As such, although there are no material issues of fact in dispute, granting judgment for the Defendants is not appropriate as a matter of law. Plaintiff has made no motion for judgment in his favor, but "[t]he grant of judgment for the nonmoving party clearly is proper if both sides agree that there are no material fact issues and join in the request that the case be decided ... on the basis of a motion for judgment made by only one of them." Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 3d* §

2720, at 346. Based on the substance of the parties' motions and responses in this declaratory judgment action, such is the case here. The Defendants' motions for summary judgment are denied, and judgment in favor of the Plaintiff is granted.

V. ORDER

IT IS, THEREFORE, ORDERED that the Plaintiff's motion to remand is hereby **DENIED**;

IT IS FURTHER ORDERED that the Defendants' motion to dismiss Plaintiff's claims based on art. XIV, § 3 of the North Carolina Constitution is **ALLOWED**;

IT IS FURTHER ORDERED that the Defendants' motions to dismiss and for summary judgment are **DENIED**; and

A Judgment for the Plaintiff is filed contemporaneously herewith.

JUDGMENT

For the reasons set forth in the Memorandum and Order filed herewith,

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Chapter 14, Sections 298 and 306.1(a)(1)(a-b) of the North Carolina General Statutes, are hereby declared unconstitutional under the United States Constitution.

IT IS FURTHER ORDERED that Plaintiff's claim based on art. XIV, § 3 of the North Carolina Constitution is hereby **DISMISSED**.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Court declines to exercise its supplemental jurisdiction over the Plaintiff's remaining pendant state constitutional claims, and the same are hereby **DISMISSED WITHOUT PREJUDICE.**

USCA CONST Art. I § 10, cl. 1-Generally
U.S.C.A. Const. Art. I § 10, cl. 1-Generally

UNITED STATES CODE ANNOTATED
CONSTITUTION OF THE UNITED STATES
ARTICLE I--THE CONGRESS

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Current through P.L. 108-35, approved 06-23-03

Section 10, Clause 1. Treaties, Letters of Marque and Reprisal; Coinage of Money; Bills of Credit; Gold and Silver as Legal Tender; Bills of Attainder; Ex Post Facto Laws; Impairment of Contracts; Title of Nobility

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility

USCA CONST Amend. XIV-Full Text
U.S.C.A. Const. Amend. XIV-Full Text

UNITED STATES CODE ANNOTATED
CONSTITUTION OF THE UNITED STATES
AMENDMENT XIV--CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

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Current through P.L. 108-35, approved 06-23-03

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NC ST § 14-298
N.C.G.S.A. § 14-298

WEST'S NORTH CAROLINA
GENERAL STATUTES ANNOTATED
CHAPTER 14. CRIMINAL LAW
SUBCHAPTER XI. GENERAL POLICE REGULATIONS
ARTICLE 37. LOTTERIES, GAMING, BINGO AND RAFFLES
PART 1. LOTTERIES AND GAMING

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§ 14-298. Gaming tables, illegal punchboards and slot machines to be destroyed by police officers

All sheriffs and officers of police are hereby authorized and directed, on information made to them on oath that any gaming table prohibited to be used by G.S. 14-289 through G.S. 14-300, any illegal punchboard or illegal slot machine, or any video game machine prohibited to be used by G.S. 14-306 or G.S. 14-306.1, is in the possession or use of any person within the limits of their jurisdiction, to destroy the same by every means in their power; and they shall call to their aid all the good citizens of the county, if necessary, to effect its destruction.

Amended by Laws 1973, c. 108, § 11; S.L. 2000-151, § 5, eff. Aug. 2, 2000.

NC ST § 14-306.1
N.C.G.S.A. § 14-306.1

WEST'S NORTH CAROLINA
GENERAL STATUTES ANNOTATED
CHAPTER 14. CRIMINAL LAW
SUBCHAPTER XI. GENERAL POLICE REGULATIONS
ARTICLE 37. LOTTERIES, GAMING, BINGO AND RAFFLES
PART 1. LOTTERIES AND GAMING

§ 14-306.1. Types of machines and devices prohibited by law; penalties

(a) Ban on New Machines.--It shall be unlawful for any person to operate, allow to be operated, place into operation, or keep in that person's possession for the purpose of operation any video gaming machine as defined in subsection (c) of this section unless either:

(1) Such machine was:

a. Lawfully in operation, and available for play, within this State on or before June 30, 2000; and

b. Listed in this State by January 31, 2000 for ad valorem taxation for the 2000-2001 tax year; or

(2) Such machine is within the scope of the exclusion provided in G .S. 14- 306(b)(1).

(b) Prohibition of More Than Three Existing Video Gaming Machines at One Location.--It shall be unlawful for any person to operate, allow to be operated, place into operation, or keep

in that person's possession for the purpose of operation at one location more than three video gaming machines as defined in subsection (c).

(c) Definitions.--As used in this section, a video gaming machine means a slot machine as defined in G.S. 14-306(a) and other forms of electrical, mechanical, or computer games such as by way of illustration:

(1) A video poker game or any other kind of video playing card game.

(2) A video bingo game.

(3) A video craps game.

(4) A video keno game.

(5) A video lotto game.

(6) Eight liner.

(7) Pot-of-gold.

(8) A video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols not dependent on the skill or dexterity of the player.

For the purpose of this section, a video gaming machine is a video machine which requires deposit of any coin, token, or use of any credit card, debit card, or any other method that requires payment to activate play of any of the games listed in this subsection. The enumeration of games in the list in this subsection does not authorize the possession or operation of such game if it is otherwise prohibited by law.

For the purpose of this section, a video gaming machine includes those that are within the scope of the exclusion provided in G.S. 14-306(b)(2), but does not include those that are within the scope of the exclusion provided in G.S. 14-306(b)(1).

(c1) Age Requirement.--It shall be an infraction for any person under the age of 18 years to play any video gaming machine defined in subsection (c) of this section. It shall be unlawful for the operator of the video gaming machine to knowingly allow a person under the age of 18 years to play any video gaming machine as proscribed by this subsection.

(c2) Hours of Operation.--It shall be unlawful to operate or allow the operation of any video gaming machine during the hours of 2:00 A.M. Sunday through 7:00 A.M. Monday.

(c3) Plain View.--Any video gaming machine available for operation shall be in plain view of persons visiting the premises.

(c4) Advertising Prohibited.--It is unlawful to advertise the operation of video gaming machines by use of on-premise or off-premise signs.

(d) Proximity to Other Locations Regulated; Permanent Building Required.--Each location where it is lawful to operate any video gaming machines as defined in G.S. 14-306.1(c) shall be at least 300 feet in any plane from any other location where such machines are operated. For the purpose of this section, a location is a permanent building having, or being within, a single exterior structure. Notwithstanding this subsection, two or more places where video gaming machines were lawfully operated under separate ownership on June 30, 2000, shall be considered to be separate locations more than

300 feet from each other, regardless of the distance from each other or whether they are located in the same building or edifice. Video gaming machines as defined in G.S. 14-306.1(c) may be operated only within permanent buildings.

(e) Registration With Sheriff.--No later than October 1, 2000, the owner of any video game which is regulated by this section shall register the machine with the Sheriff of the county in which the machine is located using a standardized registration form supplied by the Sheriff. The registration form shall be signed under oath by the owner of the machine. A material false statement in the registration form shall subject the owner to seizure of the machine under G.S. 14-298 in addition to any other punishment imposed by law. At any time that the video gaming machine is moved to a different location, the owner shall reregister the machine with the Sheriff prior to its being placed in operation. At a minimum, the registration form shall require that the registrant provide evidence of the date on which the machine was placed in operation, the serial number of the machine, the location of the facility at which the machine is operated, and the name of the owner of the facility at which the machine is operated. Each Sheriff shall report to the Joint Legislative Commission on Governmental Operations no later than November 1, 2000, on the total number of machines registered in that county, itemizing how many locations have one, two, or three machines.

(e1) Report on Receipts and Prizes and Merchandise Awarded.--The owner of each machine or the agent of that owner shall report each calendar quarter to the Department of Revenue, under oath on a form provided by that Department, the total amount of gross receipts itemized by each machine, the number of machines at that location, and the total value of prizes and merchandise awarded to players of each machine at that location. The report shall be filed by the fifteenth day of

the month after the quarter ends. Failure of the owner or agent to timely file the required report, or filing a report containing a material false statement shall subject the owner of the machine to seizure of the machine under G.S. 14-298 in addition to any other punishment imposed by law. Upon request of the Sheriff of the county, the Department of Revenue shall forward a copy of the report to the Sheriff of the county where the machines are located. The Department of Revenue shall compile the reports and make a summary report each quarter to the Joint Legislative Commission on Governmental Operations.

(f) Report to 2001 Session.--The North Carolina Sheriffs' Association, Inc., after consultation with the Division of Alcohol Law Enforcement, and the Conference of District Attorneys of North Carolina, shall report to the Joint Legislative Commission on Governmental Operations no later than January 1, 2001, its estimates of the costs of the registration process and the cost of enforcement of this section, along with suggested fees to make the registration and enforcement self-supporting, and recommendations as to a system with registration at the State level and primary enforcement at the local level. Such fee schedule is not effective until approved by the General Assembly.

(g) Exemption for Certain Machines.--This section shall not apply to assemblers, manufacturers, and transporters of video gaming machines who assemble, manufacture, and transport them for sale in another state as long as the machines, while located in this State, cannot be used to play the prohibited games, and does not apply to those who assemble, manufacture, and sell such machines for the use only by a federally recognized Indian Tribe if such machines may be lawfully used on Indian Land under the Indian Gaming Regulatory Act.

(h) Ban on Warehousing.--It is unlawful to warehouse any video gaming machine except in conjunction with the permitted assembly, manufacture, and transportation of such machines under subsection (g) of this section.

(i) Exemption for Activities Under IGRA.--This section does not make any activities of a federally recognized Indian Tribe unlawful or against public policy, which are lawful for any federally recognized Indian Tribe under the Indian Gaming Regulatory Act, Public Law 100-497.

(j) No Local Preemption.--This section does not preempt any more restrictive ordinance lawfully adopted under Article 18 of Chapter 153A of the General Statutes or under Article 19 of Chapter 160A of the General Statutes.

(k) No person who has been convicted:

(1) Once under G.S. 14-309(a) may possess any video gaming machine as defined in G.S. 14-306.1 for a period of one year.

(2) Twice under G.S. 14-309(a) may possess any video gaming machine as defined in G.S. 14-306.1 for a period of two years.

(3) Three or more times under G.S. 14-309(a) may possess any video gaming machine.

(l) Not Legalizing Unlawful Activity.--This section does not make lawful any activity which is currently unlawful.

NC ST § 14-309
N.C.G.S.A. § 14-309

WEST'S NORTH CAROLINA
GENERAL STATUTES ANNOTATED
CHAPTER 14. CRIMINAL LAW
SUBCHAPTER XI. GENERAL POLICE REGULATIONS
ARTICLE 37. LOTTERIES, GAMING,
BINGO AND RAFFLES
PART 1. LOTTERIES AND GAMING

§ 14-309. Violation made criminal

(a) Any person who violates any provision of G.S. 14-304 through 14-309 is guilty of a Class 1 misdemeanor for the first offense, and is guilty of a Class I felony for a second offense and a Class H felony for a third or subsequent offense.

(b) Notwithstanding the provisions of subsection (a) of this section, any person violating the provisions of G.S. 14-306.1 involving the operation of five or more machines prohibited by that section is guilty of a Class G felony.

Amended by Laws 1993, c. 366, § 3, eff. Dec. 1, 1993; Laws 1993, c. 539, § 211, eff. Oct. 1, 1994; Laws 1994 (1st Ex. Sess.), c. 14, § 9(a), (b), eff. Oct. 1, 1994; Laws 1994 (1st Ex. Sess.), c. 24, § 14(c), eff. March 26, 1994; S.L. 2000-151, § 3.

S.L. 2000-151, § 8, provides:

"Section 8. This act becomes effective October 1, 2000, except that:

"(1) G.S. 14-306.1(a), (c), (e), (i), (j), and (l) are effective when this act becomes law. Section 4 of this act, other than

subsections (c) and (d), are effective when this act becomes law. G.S. 14-306.1(h) becomes effective 30 days after this bill becomes law.

"(2) Section 3 of this act and G.S. 14-306(c) and (d) as added by Section 4 of this act become effective with respect to offenses committed on or after October 1, 2000, except as to a violation of G.S. 14-306.1(a), they are effective when they become law.

"(3) Sections 5 through 8 of this act are effective when they become law.

"(4) The first report under G.S. 14-306.1(e1) is for the first quarter of calendar year 2001, due April 15, 2001."